

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





# TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

APRIL TERM, 1927.

No. 4596.

416

VIRGIL BAKER, APPELLANT,

*vs.*

J. RAYMOND McCARL, COMPTROLLER GENERAL  
OF THE UNITED STATES, AND CURTIS D.  
WILBUR, SECRETARY OF THE NAVY.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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FILED APRIL 30, 1927.

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VIRGIL BAKER, APPELLANT,

*vs.*

J. RAYMOND McCARL, COMPTROLLER GENERAL  
OF THE UNITED STATES, AND CURTIS D.  
WILBUR, SECRETARY OF THE NAVY, AP-  
PELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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# Court of Appeals of the District of Columbia

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No. 4596.

VIRGIL BAKER, Appellant,

vs.

J. RAYMOND McCARL, Comptroller General of the United  
States, et al.

---

*a* Supreme Court of the District of Columbia.

Equity. No. 45554.

VIRGIL BAKER, Plaintiff,

vs.

J. RAYMOND McCARL, Comptroller General of the United  
States, and Curtis D. Wilbur, Secretary of the Navy,  
Defendants.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

*Bill of Complaint.*

Filed April 19, 1926.

In the Supreme Court of the District of Columbia, Holding  
an Equity Court.

Equity. No. 45554.

VIRGIL BAKER, Plaintiff,

vs.

J. RAYMOND McCARL, Comptroller General of the United  
States, and Curtis D. Wilbur, Secretary of the Navy,  
Defendants.

The plaintiff, Virgin Baker, respectfully shows to the  
Court as follows:

(1) That he is a citizen of the United States now resid-  
ing at San Juan, Porto Rico; that prior to November 26,  
1912, he was a Lieutenant in the United States Navy, duly  
appointed, qualified and acting as such, and on or about  
said date, to-wit, November 26, 1912, he was retired as a  
result of incapacity incident to service, with rank of Lieu-  
tenant, senior grade, in accordance with the then existing  
law and regulations of the United States Navy; that sub-  
sequent to his retirement as aforesaid, and in accordance  
with the then existing law and regulations of the United  
States Navy, and prior to April 7, 1917, he entered upon  
active duty and was on or about December 7, 1919, pro-  
moted to the rank and grade of Lieutenant Commander,  
United States Navy, Retired, and he brings this suit in his  
own behalf for the reasons more fully hereinafter stated.

The defendant, J. Raymond McCarl, is a citizen of the  
United States. He now holds office as Comptroller General  
of the United States and resides in the District of Columbia.

The defendant, Curtis D. Wilbur, is a citizen of the  
2 United States and Secretary of the Navy, and resides  
in the District of Columbia.

(2) The plaintiff was duly graduated from the United  
States Naval Academy and was by regular promotions and  
advancements promoted to the rank and grade of Lieuten-



ant, as hereinbefore stated, and, as hereinbefore stated, finally reached the rank and grade of Lieutenant Commander, Retired, on or about the 7th day of December, 1919. That in respect to his various appointments and promotions as aforesaid, he was duly qualified and commissioned in accordance with the law, and assumed his duties under said commissions and acted in such capacities under the orders of the Secretary of the Navy, and is now on active duty assigned to the Hydrographic Office, United States Navy, at San Juan, Porto Rico.

(3) That as such Naval Officer, he has been and is entitled by law to be paid and to receive his pay and allowances provided by Acts of Congress of the United States, and during the entire period of service as Naval Officer, his pay and allowances have been so paid up and until the wrongful withholding thereof hereinafter described. For the entire period within which his pay and allowances have been so withheld extending up to the filing of this Bill of Complaint, Congress has appropriated funds covering his pay and allowances, and the money for the payment thereof has been actually available and has been turned over to and is now in the possession of Thomas Cochran, the Disbursing Officer, Navy Purchasing Office, South and Whitehall Streets, New York, New York, said Cochran being the Disbursing Officer of the United States Navy in charge of plaintiff's account, said Cochran, however, being a subordinate of the defendant, Curtis D. Wilbur, Secretary of the Navy, and subject to the commands, orders and instructions of the said Curtis D. Wilbur as Secretary of the Navy, which may be given to him through his immediate superior, the Chief of the Bureau of Supplies and Accounts of the Navy Department; said officer, being now and at all times herein mentioned subject to such orders and instructions as the defendant, the Secretary of the Navy, may give to him with respect to paying to the Plaintiff his salary and allowances.

(4) The office of the Comptroller General of the United States was created by an Act of Congress which became effective July 1, 1921, the defendant J. Raymond McCarl taking office on that date. Under this Act, the Comptroller General and the General Accounting Office, of which he is the executive head, assumed the duties theretofore per-

formed by the Comptroller of the Treasury, and six auditors, which duties included the auditing of the accounts of the Disbursing Officers of the United States Navy.

(5) Prior to July 1, 1921, the date on which the defendant, J. Raymond McCarl, assumed the duties of his office as aforesaid, the plaintiff, had from time to time applied for and received allowances by way of commutation for quarters, while on active duty. That during the period from May 6, 1924, to and including June 30, 1925, the plaintiff was recalled to active duty at San Juan, Porto Rico. That during said time, he was living upon the premises known as part of Fort San Geronimo in the Island of Porto Rico, which said premises for a valuable consideration actually delivered to and received by the Government of the United States, he had leased from said Government for a period of 999 years, and under which said lease he had come into the possession of said premises, the validity of said lease being now in litigation between the Government as represented by the Department of Justice and this plaintiff in an Equity suit now pending in the District Court of the United States

4 for the District of Porto Rico. That during said period, that is to say, from May 6, 1924, to and including June 30, 1925, and being on active duty as hereinbefore stated, and residing upon the premises held by him under the lease as aforesaid, the plaintiff applied to and was furnished in accordance with the law and regulations of the Navy Department, a certificate to the effect that no public quarters were available for his use at that point. Whereupon and by reason of said application and said certificate, the plaintiff was allowed and actually paid the sum of \$1,383.33, as rental allowances by way of commutation in lieu of quarters for said period of time.

(6) Plaintiff further says that by reason of the matters and things hereinbefore stated, he became and was entitled to the aforesaid sum of \$1,383.33. Notwithstanding the payment of said sum to him and his right to receive and accept the same, the defendant J. Raymond McCarl, Comptroller General of the United States on, to-wit, January 29, 1926, acting in his official capacity, rendered an opinion bearing date of said January 29, 1926, and No. A-11668, a copy of which is hereto annexed and marked "Plaintiff's Exhibit A," which he prays may be read in connection herewith, and considered as a part of this, his Bill of Com-



plaint. That under said opinion, as by reference thereto will appear, the said defendant, the Comptroller General, ruled and determined that the plaintiff was not entitled to have and receive the said sum of \$1,383.33, as aforesaid paid to him, while occupying the aforesaid premises during the period from May 6, 1924, to and including June 30, 1925, and further holding that the payment of said sum "should be and is disallowed." That a copy of said opinion was in due course transmitted to the defendant, the Secretary of — Navy, and by him or through his orders, was delivered to the aforesaid Thomas  
5 Cochran, Disbursing Officer, as aforesaid.

(7) That on or about July 1, 1915, the plaintiff, then being a retired Naval Officer and occupying an inactive status, was appointed to the position as Inspector of Hulls, Steamboat Inspection Service, Department of Commerce, which said position he continued to occupy continuously from said 1st day of July, 1915, to the 31st day of July, 1923; that during said period of time, he was restored to active duty in the United States Navy and was on active duty in said Department from to-wit, the 7th day of April, 1917, to the 26th day of January, 1920, and was serving as such Naval Officer on active duty during said period of time; and during said period of time was also serving in his capacity as Inspector of Hulls as aforesaid, and received the salary provided by law for both said positions, and that said salaries were paid to him by the respective Departments, covering said period of time. That for that period extending from April 7, 1917, to January 26, 1920, he received as salary for his position as Inspector of Hulls, the sum of \$6,367.88. During that period of time for which the aforesaid sum of money was paid to him as Inspector of Hulls as aforesaid, the Act of July 31, 1894, 28 Stat. 205, was in full force and effect. That subsequent thereto, it having appeared to the Congress of the United States that during the period of the war, many retired officers of the Army and Navy had received double salaries in violation of the said Act, whereupon the Congress passed the Act of May 31, 1924, 34 Stat. 245, amending the Act of July 31, 1894. as follows:

"That section 2 of the Legislative, Executive, and Judicial Appropriation Act, approved July 31, 1894, is

amended by adding at the end thereof a new sentence to read as follows: 'Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement.' "

Whereupon and by reason of the passage of the said Act, the payment of the aforesaid sum of money was by the Congress of the United States duly validated and ratified, but notwithstanding the passage by the Congress of the aforesaid Act of May 31, 1924, and in utter disregard thereof, the defendant, J. Raymond McCarl, Comptroller General, as aforesaid, on the 29th day of January, 1926, rendered an opinion No. A-11668, a copy of which is hereto attached, and marked "Plaintiff's Exhibit B" which he prays may be read in connection herewith and taken as part of this, his Bill of Complaint. In said opinion, the defendant, the Comptroller General as aforesaid, ruled that the payment to the plaintiff under the circumstances aforesaid, of the said sum of \$6,367.88, was unauthorized and found the plaintiff, in his judgment, to be indebted to the United States in the said sum of \$6,367.88, as representing salary paid to the plaintiff as Inspector of Hulls during the period of time from April 7, 1917, to January 26, 1920, said opinion concluding as follows:

"and a charge will be raised against him on the books of this office in that amount."

That a copy of said opinion was in due course delivered to the defendant, the Secretary of the Navy, and by him or through his orders transmitted to the aforesaid Thomas Cochran, Disbursing Officer, as aforesaid.

(8) The plaintiff alleges and avers that he is lawfully and justly entitled to the aforesaid two sums of money, to-wit, the sum of \$1,383.33 for rental allowances, and the sum of \$6,367.88 as salary as Inspector of Hulls as aforesaid. That the action of the defendant, the Comptroller General, is without warrant or authority of law and contrary to the

7 provisions of the several Acts of Congress herein referred to; that no suit at law has been instituted against this plaintiff to establish his liability to the Government in respect to said sums. That the defendant, J. Raymond McCarl, Comptroller General of the United States, has threatened to deny payment of the accounts of the said Thomas Cochran, Disbursing Officer, as aforesaid, if he pays over to the plaintiff his salary and allowances now due and to become due in the future, unless this plaintiff reimburses or pays back to the Government the aforesaid sums of \$1,383.33 and \$6,367.88. That notwithstanding the fact that the Congress of the United States has appropriated the money for the payment of salary and allowances of this plaintiff, and that said fund is now in the hands of the said Thomas Cochran, Disbursing Officer, as aforesaid, and by reason of the decision of the defendant, the Comptroller General hereinabove referred to, and because of the threat of the said Comptroller General to disallow the account of the said Thomas Cochran if he pays to this plaintiff his salary and allowances, as aforesaid, without collecting the aforesaid sums of money, the said Thomas Cochran, Disbursing Officer as aforesaid, on March 6, 1926, refused and still does refuse to pay to the plaintiff his regular salary and allowances now due and to become due to him to which he is lawfully entitled, all of which appears by reference to a letter from said Disbursing Officer to the plaintiff bearing date of March 6, 1926, copy of which is hereto annexed and marked "Plaintiff's Exhibit C" which he prays may be read in connection herewith and considered as a part hereof. That in and by said letter as will appear by reference thereto the said Thomas Cochran, Disbursing Officer, being as hereinbefore stated, an officer under the control and direction of the defendant, the Secretary of the Navy, has refused to pay to this plaintiff his lawful salary and allowances or to turn over to the plaintiff or to issue to him checks covering his pay and

8 allowances "until further instructions are received from Washington," (meaning thereby that he will withhold) and is actually withholding all pay and allowances due this plaintiff and that the defendant, the Secretary of the Navy, the superior officer of said Thomas Cochran, has failed and refused and up to the time of the filing



of this bill, continues to refuse to instruct the said Thomas Cochran, to issue to the plaintiff his pay and allowances now lawfully due to him.

(9) The plaintiff further alleges and avers, as hereinbefore stated, that no suit or action at law has been instituted against him to establish his liability for the aforesaid sum. He denies that the said sums are due and owing to the Government, but on the contrary, states that the said sums were paid to him in accordance with law, and that he is entitled to keep and retain the same, and that he is entitled to have the judgment of a court of law and the verdict of a jury upon the question of his liability to refund or repay said sums to the Government, and that his pay and allowances are being withheld from him solely because of an imaginary, visionary and wholly unfounded claim against him set up on the books of the Comptroller General of the United States without warrant or authority of law.

Wherefore, the plaintiff being without remedy save in this honorable Court, prays the Court as follows:

1. That a writ of subpoena be issued out of this honorable Court directed to the defendant, J. Raymond McCarl, Comptroller General of the United States, and Curtis D. Wilbur, Secretary of the Navy, commanding them and each of them to appear in this Court on a day certain and there to answer unto the exigencies of this, his Bill of Complaint.

2. That the demand of the defendant, J. Raymond McCarl, Comptroller General, for the withholding of  
9 pay and allowances as herein described, be adjudged to be unauthorized and of no legal force or effect.

3. That any order or communication of the defendant, Curtis D. Wilbur, Secretary of the Navy, to the said Thomas Cochran, Disbursing Officer, or any other clerk, servant, agent or employee of said defendant, Curtis D. Wilbur, be adjudged to confer no legal authority upon said Cochran or any subordinate of the defendant Curtis D. Wilbur, to withhold from the plaintiff any part of his current pay and allowances to be applied to the liquidation of said claim against the plaintiff set up by the defendant, J. Raymond McCarl, in his said opinion of January 29, 1926, and disputed by the plaintiff.

4. That the defendant, J. Raymond McCarl, be enjoined and restrained *pendente lite*, and permanently upon the

final hearing of this cause, from and against any and all interference on his part with the Chief of the Bureau of Supplies and Accounts of the Navy Department, the acts of Thomas Cochran, Disbursing Officer at New York, or any disbursing officer of the United States Navy, to prevent the payment to the plaintiff of his pay and allowances, or any part thereof, heretofore and now being unlawfully withheld as hereinbefore described, and that he be directed by proper decree of this Court, to pass and approve the accounts of the said Thomas Cochran, Disbursing Officer, as in this Bill described so far as the accounts of this plaintiff are concerned, notwithstanding the refusal of the plaintiff to pay and satisfy the aforesaid demands made by the said defendant, the Comptroller General.

5. That the defendant, Curtis D. Wilbur, and his subordinates, including the Chief of the Bureau of Supplies and Accounts, and the disbursing officers of the United States Navy, be enjoined and restrained *pendente lite*, and permanently upon the final hearing of this cause, from  
10 withholding or causing to be withheld from the plaintiff any part of his current pay and allowances hereinbefore described by reason of anything contained in the said opinion of the said J. Raymond McCarl, dated January 29, 1926, or by reason or means of any other communication or order from the said J. Raymond McCarl seeking to effect the same purpose.

6. That in like manner, the defendant J. Raymond McCarl and the defendant Curtis D. Wilbur, or through him his subordinates in the Navy Department, including the Chief of the Bureau of Supplies and Accounts and the disbursing officers of the United States Navy, be also enjoined and restrained from interfering in any manner with the payment of or from withholding the pay and allowances, or any part thereof, of the plaintiff to be applied in liquidation of any unadjudicated and disputed claim set up as aforesaid, by the defendant J. Raymond McCarl, for the alleged unlawful payments to this plaintiff of the salary and allowances in this Bill of Complaint mentioned, and that the defendant Curtis D. Wilbur, be by an appropriate order of this Court, commanded and directed to instruct the said Thomas Cochran, Disbursing Officer, to issue to the plaintiff checks in payment for his current salary and allowances accruing

and due to him at the time of the issuance of the letter by the said Thomas Cochran dated March 6, 1926, and described herein as "Plaintiff's Exhibit C" and that the said Cochran be directed by the defendant, Curtis D. Wilbur to continue to pay to this plaintiff his salary and allowances accruing to him in the future without regard to or consideration of the opinion of the defendant J. Raymond McCarl, dated January 29, 1926, or any other opinion or direction of the said defendant McCarl, concerning the subject matter of this litigation.

7. That a rule issue to the defendant, J. Raymond McCarl and the defendant, Curtis D. Wilbur, and each of them, requiring them to appear at a time to be fixed therein and show cause, if any they have, why they should not be  
11 enjoined and restrained as aforesaid, pending final hearing of this cause, and for such other further and general relief as the nature of the cause may require, and the plaintiff will ever pray and as in duty bound.

VIRGIL BAKER,

*Plaintiff,*

By SEIFORDE M. STELLWAGEN,

*Attorney in Fact.*

PALMER, DAVIS & SCOTT,

WM. J. NEAL,

*Attorneys for Plaintiff.*

CITY OF WASHINGTON,

*District of Columbia, ss:*

I, Seiforde M. Stellwagen, being duly sworn, do on oath depose and say that I am one of duly constituted and appointed attorneys in fact for the plaintiff under and by virtue of a duly and properly executed power of attorney under which I have authority to make this affidavit; that I have read the foregoing and annexed Bill of Complaint by the plaintiff subscribed by me as attorney in fact; that I know the contents thereof and that the matters and things therein set forth I verily believe to be true.

VIRGIL BAKER,

By SEIFORDE M. STELLWAGEN,

*Attorney in Fact.*



Subscribed and sworn to before me this 19th day of April, 1926.

[NOTARIAL SEAL.]

RUTH C. ROWE,  
*Notary Public.*

My Commission Expires Jan. 22, 1931.

12

EXHIBIT "A."

Comptroller General of the United States, Washington.

A-11668.

Jan. 29, 1926.

There are before this office for consideration certain payments to Virgil Baker, lieutenant commander, U. S. Navy, retired, of rental allowances. It appears that the officer was retired as a lieutenant, U. S. Navy, on November 26, 1912, for incapacity incident to service. Subsequent to retirement, he served on active duty for the periods from November 2, 1913, to June 1, 1915, from April 7, 1917, to January 26, 1920, and from December 4, 1923, to April 10, 1924. He again reported for active duty on May 6, 1924, and was still serving on active duty on June 30, 1925, which is the last period of his service covered by accounts transmitted to this office, for audit and settlement.

The records show that prior to August 25, 1919, the officer had been occupying a house at Fort San Geronimo as official quarters of the District Communication Superintendent, supposedly at a saving to the Government of \$60 per month. On August 25, 1919, he secured a five year lease of these quarters and surrounding land upon representations made in letter dated July 10, 1919, one of which was to the effect that he would erect on the premises a permanent concrete residence of approved type of construction, costing not less than \$10,000, in which he would reside with his family and during such residence would waive a claim to other quarters or to commutation of quarters. On December 3, 1919, he requested an extension of the five year period by permanent lease, again stating his willingness to waive commutation of quarters

13 while occupying the house. On July 15, 1921, the premises were let to him, his heirs and assigns under an alleged lease for a period of 999 years. This officer while serving on active duty at Culebra, some distance removed

from San Juan, during the period from December 4, 1923, to April 10, 1924, applied for public quarters and was given a certificate to the effect that no public quarters were available. He was accordingly paid rental allowance for this period. He was also paid rental allowance for the period from May 6, 1924, to June 30, 1925, while on active duty at San Juan, Porto Rico, having been furnished with a certificate to the effect that no public quarters were available for his use at that point. While it is probably true that the offer to waive commutation of quarters was ineffectual as such to deprive the officer of his right to commutation or rental allowance, it is also true that the use of the premises at Fort San Geronimo whether under a valid or invalid lease was granted with the understanding that the premises were to be accepted and used as quarters in kind whenever the status of the officer should entitle him to quarters at that point. In other words there was not an actual waiver of the right to quarters or commutation, but an acceptance from the Government of quarters in kind and additional use of the premises not accruing to an officer in an official status.

With regard to the period of service at Culebra, it would appear that the officer being entitled to quarters in kind at that point and no quarters being available there for his use, the payment of rental allowance for that period was proper. With regard to the period of service at San Juan, however, it would appear that Fort San Geronimo being in the vicinity of San Juan, the use of the premises covered by the alleged lease was an acceptance of quarters in kind

for duty at that point, and rental allowance paid him  
14 for active duty for the period from May 6, 1924, to  
June 30, 1925, in the amount of \$1,383.33 while occupying said premises should be and is disallowed.

(Signed)

J. R. McCARL,

*Comptroller General of the United States.*

#### EXHIBIT "B."

Comptroller General of the United States, Washington.

A-11668.

January 29, 1926.

There is before this office for consideration, the question whether Lieutenant Commander Virgil Baker, U. S. Navy,

retired, while serving on active duty as an officer of the Navy was entitled to receive additional salary for service as an Inspector of Hulls in the Department of Commerce. The facts with regard to Lieutenant Commander Baker's service so far as here material are as follows:

He was retired on November 26, 1912, as a lieutenant, U. S. Navy, retirement resulting from incapacity incident to service (See Navy Register 1913, page 178). Subsequent to retirement he served on active duty for the periods from November 2, 1913, to June 1, 1915, from April 7, 1917, to January 26, 1920, and from December 4, 1923, to April 10, 1924. He again reported for active duty on May 6, 1924, and was still serving on active duty on June 30, 1925, which is the last period of his service covered by accounts submitted to this office.

In addition to the foregoing service as an officer of the Navy, the records show that Lieutenant Command Baker accepted a civil service appointment on July 1, 1915, as Inspector of Hulls, Steamboat Inspection Service, Department of Commerce, and served in such capacity from July 1, 1915, to July 31, 1923. During the period therefore from April 7, 1917, to January 26, 1920, he was serving as an officer of the Navy on active duty, with compensation in excess of \$2,500 per annum, and also as an Inspector of Hulls in the Steamboat Inspection Service. Under the act of July 31, 1894, 28 Stat. 205, an officer was forbidden, while serving in the Navy at a compensation in excess of \$2,500 per annum, to hold another office to which compensation attached. The act of May 31, 1924, 43 Stat. 245, amending the act of July 31, 1894, provides:

“That section 2 of the Legislative, Executive, and Judicial Appropriation Act, approved July 31, 1894, is amended by adding at the end thereof a new sentence to read as follows: ‘Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement.’ ”

Under this amendment to the original act the officer, having been retired for incapacity incurred in line of duty can



not be construed to have held an office for the period from January 27, 1920 to July 31, 1923, during which his status was that of a retired officer on inactive duty. 4 Comp. Gen. 506.

With respect to the period from April 7, 1917, to January 26, 1920, the records show that the officer was on active duty and the phrase "during such retirement" as used in the act of May 31, 1924, does not include periods of active duty of retired officers. When an officer, although retired, enters upon a period of active duty, he cannot be said to be for such period *in retirement* and service rendered during such period is not service rendered during retirement. It is to be noted in this connection that the act of May 31, 1924,

16 in its original form as Senate Bill 2450, was designed to cover only cases of retired enlisted men on inactive duty who were holding civil positions in the Government service while on such inactive duty. See Senate Report No. 254 and House Report No. 498 of the 68th Congress, 1st session. The bill was amended in the House of Representatives to include officers retired for injuries received in battle or for injuries or incapacity incurred in line of duty and the amendment was concurred in by the Senate. See 65 Congressional Record, pages 9137 and 9279. There is nothing to indicate, however, that it was the intention of Congress by such amendment to extend the operation of the act to include cases of retired officers on active duty holding a civil position. Further, it would appear that service in the Steamboat Inspection Service is incompatible with active duty as an officer of the Navy.

The pay received by the officer therefore, as an Inspector of Hulls for the period from April 7, 1917, to January 26, 1920, when he was on active duty as an officer of the Navy, amounting to \$6,367.88 was unauthorized. In view of the facts now appearing, the officer is found to be indebted to the United States in the sum of \$6,367.88, the amount paid him for salary as an Inspector of Hulls during the period from April 7, 1917, to January 26, 1920, and a charge will be raised against him on the books of this office in that amount.

(Signed)

J. M. McCARL,  
*Comptroller General of the United States.*



17

## EXHIBIT "C."

Copy.

In reply refer to No. OR (B).

Navy Purchasing Office, South and Whitehall Streets, New  
York, N. Y.

6 March, 1926.

From: Disbursing Officer, Navy Purchasing Office, South  
& Whitehall Streets, New York, N. Y.

To: Lieutenant Commander Virgil Baker, USN (Retd),  
San Juan, Porto Rico.

Subject: Pay and rental allowances.

Reference: (a) Decision of the Comptroller General January 29, 1926, (A-11668) Re:—Additional salary for service as Inspector of Hulls in the Department of Commerce.

(b) Decision of the Comptroller General January 29, 1926 (A-11668) Re: Rental allowances in the case of Lt. Commander Virgil Baker USN (Retired).

1. In accordance with reference (a) the Comptroller General has decided that you are indebted to the United States to the amount of \$6,367.88 covering salary paid to you as an Inspector of Hulls for the period April 7, 1917, to January 26, 1920, and in accordance with reference (b) the Comptroller disallowed the amount of \$1,383.33 for rental allowances paid while on active duty for the period May 6th, 1924 to June 30, 1925.

2. In view of the above indebtedness this office does not feel justified in continuing to issue your checks for pay and allowances, until further instructions are received from Washington.

(S.)

T. E. WRIGHT,  
For THOMAS COCHRAN.

(ECZ—(160)).

18

*Rule to Show Cause.*

Filed April 19, 1926.

\* \* \* \* \*

Upon consideration of the Bill of Complaint filed in the above entitled cause, and the exhibits thereto attached, it

is this 19th day of April, 1926, ordered that the defendants, J. Raymond McCarl, Comptroller General of the United States, and Curtis D. Wilbur, Secretary of the Navy, appear in this Court on or before the 30th day of April, 1926, at 10 o'clock A. M., and show cause, if any they have, why they should not be enjoined and restrained as prayed in said Bill, pending the final determination of this cause, providing a copy of this order be served upon each of the defendants two days before the return day fixed herein.

By the Court:

F. L. SIDDONS,

*Justice.*

*Marshal's Return.*

Served a copy of the within rule on J. R. McCarl Comp. Gen.—Personally and C. D. Wilbur Sec'ty of Navy personally: 4-21-26.

E. C. SNYDER,  
*U. S. Marshal.*

K.

19 *Separate Answer of J. Raymond McCarl, Comptroller General of the United States.*

Filed May 5, 1926.

\* \* \* \* \*

Comes now J. Raymond McCarl as Comptroller General of the United States, one of the defendants herein, for himself individually and officially, and now and at all times saving and reserving to himself the benefit of all objections and exceptions to the errors and insufficiencies of the bill of complaint filed herein, and for misjoinder of and want of proper parties defendant, and reserving to himself individually and officially the lack of jurisdiction of this court over the subject matter of the bill of complaint and the lack of jurisdiction of the Supreme Court of the District of Columbia to restrain and enjoin him as Comptroller General of the United States from performing the duties conferred and mandatorily enjoined by the statutes of the United States on the General Accounting Office under his supervision and direction and which duties involve the

exercise of judgment and discretion, nevertheless answering so much of the Rule to Show Cause and Bill of Complaint as he is advised it is material and necessary for him to make answer, says as follows:

(1) The averments of paragraph 1 of the bill, except in so far as they refer to the plaintiff as to which this defendant is not informed and except in so far as they refer directly to defendant Curtis D. Wilbur as to which this defendant is informed that said defendant will answer separately, are admitted, but further answering the said paragraph this defendant avers that he resides in the District of Columbia solely for the purpose of performing his official duties as Comptroller General of the United States and that he is a legal resident of the State of Nebraska.

20 (2) This defendant is not informed as to the averments of fact in paragraph (2) of the bill and same are neither admitted nor denied.

(3) The averments of paragraph 3 are denied as stated. This defendant avers that the monthly and annual pay of plaintiff when on active duty must be ascertained, computed and determined by this defendant pursuant to the provisions of the act of June 10, 1922, 42 Stat. 625 to 633, inclusive, and other statutes as construed in many decisions of the courts and of the accounting officers of the United States and in general in accordance with the conditions of first appointment in the Naval service, grade held, length of service in the grade, and character of duty performed. The monthly and annual rental and subsistence allowances authorized by the said act of June 10, 1922, and the amendatory act of May 31, 1924, 43 Stat. 250, is dependent upon all of the factors which determine the particular one of the six pay periods from which plaintiff is entitled to pay; whether plaintiff has a wife, child or dependent children under twenty-one years of age or a mother "in fact dependent upon him for chief support"; and whether the full number of rooms authorized by law for his grade have been assigned to him and if not, whether his superior officer has certified that a less number of rooms are sufficient for his needs. When the character of plaintiff's first appointment in the service, his grade, length of active service, and character of duty has been determined and the amount of monthly or annual pay have been ascertained, computed,



and determined, and the facts determined as to whether he has a wife, child or children under twenty-one years of age or a mother, in fact dependent upon him for her chief support and whether he or his dependents have been assigned public quarters, the total amount of his monthly or annual pay and allowances is chargeable to the appropriations made by the Naval Appropriation Act of February 11, 1925, 43 Stat. 871, 872.

21       “For pay and allowances prescribed by law of officers on sea duty and other duty, and officers on waiting orders—pay \$25,796.06, rental allowance \$5,339,920, subsistence allowance \$3,316,720, in all \$34,452,646.”

The retired pay of plaintiff when on inactive duty must be ascertained, computed, and determined pursuant to various and sundry statutes of the United States and decisions of the Courts and of the accounting officers. When so determined payment is made from the lump sum of \$4,145,766 appropriated in the Naval Appropriation Act of February 11, 1925, 43 Stat. 872.

However, said pay and allowances can not be paid from said lump sums unless and until warrants chargeable thereto have been drawn by the Secretary of the Treasury and countersigned by this defendant pursuant to Section 11 of the Act of July 31, 1894, 28 Stat., 208, and it be shown that the pay and allowances have not been forfeited under the act of June 10, 1896, 29 Stat., 361, on account of employment by a contractor furnishing war or naval supplies to the United States, or under section 1766, Revised Statutes, he was not formerly a disbursing officer and indebted to the United States, or under section 1557, Revised Statutes, he was not on furlough or half pay, or under the act of August 29, 1916, 39 Stat. 580, he was not absent from duty due to intemperate use of drugs or alcoholic liquors or other misconduct, or had not been sentenced by a Naval court martial to forfeit all or part of his pay and allowances, or was not otherwise indebted to the United States.

This defendant denies that any part of the total of \$34,452,646 or of \$4,145,766 appropriated by the act of February 11, 1925, for the pay and allowances of all officers of the Navy during the fiscal year 1926, have been turned over to, or otherwise placed in the possession of



Thomas Cochran or any other Navy disbursing officer as moneys of plaintiff's pay and allowances, or any specific portion thereof, but that such sums of said appropriation act of February 11, 1925, as may be to his credit with the Treasurer of the United States have been advanced to him upon warrants countersigned by this defendant as Comptroller General of the United States to make payments of credit balances determined by this defendant in favor of debtors of the United States and all other payments made by said Thomas Cochran, are made on his sole responsibility under his official bond to the United States for all such payments that this defendant may determine in the audit of his account not to have been legally and rightfully made. Any order by a commanding officer of the Navy to plaintiff imposes on that commanding officer responsibility to the United States for the legality of such payment as provided in Section 285, Revised Statutes and as held in *United States v. Jones*, 26 Fed. cas. No. 15493a, p. 653, 18 Howard, 92.

(4) The averments of paragraph (4) are matters of statutory law beginning with the Ordinance of September 26, 1778, of the Continental Congress and including the acts of September 2, 1789, 1 Stat. 65, act of March 3, 1817, 3 Stat. 366, act of July 31, 1894, 28 Stat. 205, 211, except where inconsistent to and repealed by the Budget and Accounting act of June 10, 1921, 42 Stat. 23, 27, and in so far as the auditing and settlement of accounts is concerned are substantially as stated in *McKnight v. United States*, 13 Ct. Cls. 299.

(5) and (6) This defendant denies the averments of paragraphs (5) and (6) of the bill as stated and avers that the Navy Department secured from the War Department by five year lease dated June 1, 1917, certain lands near San Geronimo Naval Reservation. A second lease was executed March 18, 1919, between the two departments whereby the Navy Department secured the land for a period of 99 years on recommendation of plaintiff who was the senior naval officer present at San Juan that the land was necessary "for the operation of a Radio Telegraph Station and for other naval purposes."

On September 6, 1919, the Navy Department requested the War Department to transfer title to it of the aforesaid

land pursuant to the provisions of the act of July 11, 1919, 41 Stat. 129, which authorized interchange of lands for certain purposes between the Army and Navy. The transfer was effected on December 15, 1919.

After the execution of the aforesaid 99 year lease of March 18, 1919, plaintiff wrote a letter dated July 10, 1919, a copy of which is attached as Exhibit "A," to the Secretary of the Navy requesting execution of a lease to him of a part of the land obtained from the War Department. Among other things, plaintiff stated in said letter if the lease was executed:

"I would also guarantee to erect thereon a permanent concrete residence of approved type of construction and costing not less than \$10,000. I would reside in this residence with my family, and during such residence, I would waive all claim to other quarters or to commutation of quarters."

The lease was approved and executed on August 26, 1919, for a term of five years. A copy of said lease is attached hereto as Exhibit "B." Plaintiff was on active duty as an officer of the Navy during the period for which this lease was in effect and neither claimed nor received commutation of quarters and in so far as this defendant is informed he did not occupy other Government quarters.

After the Navy Department had requested on September 6, 1919, as aforesaid, that the land at San Juan, including the tract theretofore leased by it to plaintiff to be permanently transferred to it, plaintiff wrote a letter dated December 3, 1919, to the Bureau of Steam Engineering, Navy Department, requesting that the land be then held under the lease of August 26, 1919, be permanently transferred to him. A copy of said letter is hereto attached as Exhibit

"C." Plaintiff stated in said letter that if the transfer was made:

"I would agree to waive commutation of quarters while occupying the property, and, in time of war to place at the disposal of the Department, free of cost, the entire property, and all improvements thereon."

A lease was approved and executed June 15, 1921, by Theodore Roosevelt, Acting Secretary of the Navy, pur-

porting to lease the said tract of land to plaintiff, his heirs and assigns for a period of 99 years and as averred by plaintiff, the Department of Justice, acting on behalf of the United States, has in an Equity proceeding now pending in the District Court for the District of Porto Rico, brought suit to cancel said lease on the grounds, among others, that it was not authorized by Section 5 of the Naval Appropriation Act of July 12, 1921, 42 Stat. 139, 140, and the act of August 29, 1916, 39 Stat. 559, 560, and that there was no consideration for the so-called lease.

The accounts of plaintiff for the period from May 6, 1924, to June 20, 1925, disclosed that notwithstanding his representations in the aforesaid letters of July 10, 1919, and December 3, 1919, Exhibits "A" and "C," not to claim commutation of quarters should the requested leases be executed and notwithstanding the execution of the leases of August 26, 1919, and July 15, 1921, he had claimed and received from sundry naval disbursing officers an aggregate of \$1,383.33 as commutation of quarters, or rental allowances while on active duty as a Navy officer while on duty at or near San Juan, Porto Rico. This defendant, in the audit and settlement of said accounts, disallowed credit for the said sum of \$1,383.33, as having been improperly paid to plaintiff. Some of the reasons for this defendant's conclusion that the payments were improperly received by plaintiff are stated in decision dated March 20, 1926,

(A-11668) copy attached as Exhibit "D" which is  
25 in reconsideration of prior decisions dated January 29, 1926, plaintiff's Exhibits "A" and "B."

(7) This defendant admits the averments of fact in paragraph (7) of the bill and is advised that he is not required to answer plaintiff's conclusions of law. Further answering the averments of fact in said paragraph, this defendant has attached to this answer as Exhibit "D" a copy of his decision of March 20, 1926, which is a reconsideration of his prior decision of January 29, 1926, (A-11668), plaintiff's Exhibits "A" and "B" and wherein are set forth some of the reasons for this defendant's conclusion that plaintiff was not entitled under the law to the aggregate sum of \$6,367.88 received by him as civilian Inspector of Hulls, Department of Commerce at the same time he was on active duty as an officer of the Navy Department and



in receipt of salary and allowances in excess of \$2,500 a year. Balances of \$1,383.33 on account of allowances improperly received as aforesaid and of \$6,367.88 on account of salary as Inspector of Hulls were certified due from plaintiff to the United States as provided in Sections 304 and 305 of the Budget and Accounting Act of June 10, 1921, 42 Stat. 24.

(8) The averments of fact of paragraph (8) of the bill, except in so far as they refer directly to defendant Curtis D. Wilbur and to Thomas Cochran, as to which this defendant has no knowledge but is informed that defendant Wilbur will answer separately, and further excepting the averments of plaintiff's conclusions of law, as to which this defendant is advised he is not required to answer, and further excepting the averment that no suit has been instituted against plaintiff to recover the aforesaid balances of \$1,383.33 and \$6,367.88 which is admitted, are denied. Further answering, this defendant avers that paragraph 4888, Navy Regulations, which is but a restatement of a provision contained in Naval Regulations for many years, reads, in part, as follows:

26        "When an officer of the Pay Corps received a notification from the Auditor for the Navy Department of a suspension not susceptible of explanation, or of a disallowance of an illegal payment in a personal account, or discovers an overpayment due to error, he may check the amount improperly paid against the account of the person concerned, if such person is still carried on his rolls; if transferred he may, through the regular official channel, request the officer on whose roll the account is borne to make the necessary checkage, forwarding with the request an extract from his roll or the auditor's statement, in duplicate, showing in detail the reason why the checkage is required; all such requests or statements shall be certified by the officers making them to be correct. The officer receiving the request shall then check the amount in accordance therewith, filing same as a pay-roll voucher, noting over the checkage the name of the officer making the request, and shall immediately notify the auditor of the action taken, forwarding at the same time the duplicate extract from the roll or the auditor's statement. \* \* \*



(9) This defendant, in answer to paragraph (9) of the bill, avers that pursuant to Section 236, Revised Statutes, as amended by the act of June 10, 1921, 42 Stat. 24, his settlements are made final and conclusive on the Executive Departments of the Government and are final and conclusive on this court in so far as general appropriations are concerned and that this court lacks jurisdiction to review his discretionary settlements charging plaintiff with sums of public money improperly obtained from the United States Treasury. This defendant avers that plaintiff has a plain and adequate remedy at law under the Judicial Code of March 3, 1911, 36 Stat. 1136 to 1143, inclusive in a suit against the United States for any sums which may have been withheld from his pay and allowances. However, if this court takes jurisdiction of the cause of action set out in the bill of complaint, then of necessity, equity, and good conscience the court must determine the claim of the United States against plaintiff for the items of \$1,383.33 and \$6,367.88, and either dismiss the bill of complaint as being without equity or provide in its decree

for payment by the plaintiff into the United States  
27 Treasury of said sums of \$1,383.33 and \$6,367.88.

Wherefore, this defendant having fully answered the Rule to Show Cause and the Bill of Complaint, prays that your Honorable Court deny an injunction *pendente lite* and dismiss the bill of complaint filed herein so far as the same is directed against him and that he may have his costs.

J. RAYMOND McCARL,  
*Defendant.*

R. L. GOLZE,  
O. R. McGUIRE,  
*Attorneys for Defendant McCarl.*

DISTRICT OF COLUMBIA, ss:

I, J. Raymond McCarl, on oath state that I have read the foregoing answer by me subscribed, and know the contents thereof, and that the matters and things therein set forth I verily believe to be true.

J. RAYMOND McCARL.

Subscribed and sworn to before me this fifth day of May, 1926.

[NOTARIAL SEAL.]

S. B. TULLOSS,  
*Notary Public, D. C.*

## EXHIBIT "C."

Copy.

N. S. E. 11c.

Address District Communication Superintendent and refer to No. —.

Inclosures.

Navy Department, United States Naval Communication Service.

Office of District Communication Superintendent.

U. S. Naval Radio Station,  
San Juan, Porto Rico, December 3, 1919.

From: Lieutenant-Commander Virgil Baker, U. S. N., Ret.

To: Bureau of Steam Engineering.

Via: Governor of the Virgin Islands.

Subject: Requests authority to acquire and transfer to the Navy Department a site for a distant-control radio station in exchange for a section of San Geronimo Naval Reservation already leased to him.

References: (a) 1st End. dated 7/11/19, of Governor, Virgin Islands, approving lease.

(b) D. N. C. 2nd End. 33667-239, dated 8/25/19, approving lease.

(c) Bu. S. E. 3d End. 441677-920-4-W, dated 8/26/19, approving lease.

(d) Lease granted 8/26/19, which provides also for complete transfer.

1. Your approval is requested of the transfer to me by permanent title, or by permanent lease, subject to certain conditions during war, of the small tract of land on which I have been granted a 5-year lease by the Navy Department for a nominal sum.

2. In return for such permanent title or lease I would obtain immediately and transfer to the Navy Department

full title to the 9-acre tract of land already selected as a site for a receiving and distant-control radio station in Porto Rico. In addition I would obtain immediately and transfer to the Navy Department perpetual easements for laying the underground receiving systems in the surrounding tracts of land included in a circle whose radius is 2,000 feet and whose center is at the point on the radio site where the radio building is to be located.

3. Options have been obtained which enable me to make these transfers to the Navy Department immediately so that any delay necessary to transferring to me title to the tract of land I have leased need not delay the construction of the distant-control station.

4. On the tract of land on which I have the lease  
29 I wish to build a residence for my personal use and to make sanitary and other improvements amounting to over \$12,000, and permanent title to the small tract of land is desired in order to protect that investment.

5. I would agree to waive commutation of quarters while occupying the property, and, in time of war to place at the disposal of the Department, free of cost, the entire property, and all improvements thereon, including the residence.

6. Whether retained on active duty or not I intend to remain in Porto Rico, and shall always consider myself available for orders to active duty in case I am needed.

7. It might be of some advantage to the Service to have living adjacent to the Naval Reservation a retired officer who would be at all times available for active duty if needed, especially as there is no other permanently commissioned Line Officer of the Navy stationed or residing in Porto Rico. Such was the case at the time of our entry into the war with Germany, when I was immediately ordered to active duty and was given charge of all the activities of the Navy on shore in Porto Rico. These included Naval Communication, Cable-Censorship, Naval Intelligence, Routing of Vessels, and mail Censorship.

8. Attention is invited to the 5th paragraph of the lease I now have, which reads, "This lease is made pending complete transfer by Congress of title of the lessee which transfer meets the approval of the Navy Department."

(Sgd.)

VIRGIL BAKER.



## EXHIBIT "B."

Copy.

*Lease.*

San Geronimo Naval Reservation, San Juan, Porto Rico.

Whereas, Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), is desirous of having control of a small site of land on the San Geronimo Naval Reservation at San Juan, Porto Rico, for the purpose of erecting a residence thereon, for improving the sanitary conditions of said site of land, and for making other improvements thereon, all of which will be of benefit to the entire Naval Reservation, and

Whereas, the below-described tract of land on the San Geronimo Naval Reservation is not now required and in all foreseeable probability will never be required for Government use; and *having the public interests in view*, and in *consideration* of the *sanitary and other improvements* which the said Lieutenant-Commander Virgil Baker proposes to make, and in *consideration* of the *payment* by him of a *total rental* of one dollar (\$1.00), and in *recognition of services* rendered by him in the war with the German Empire and in other wars and expeditions, said site of land, with right of way thereto is hereby leased in accordance with law, to the said Lieutenant-Commander Virgil Baker,

U. S. Navy (Retired), and his heirs \* \* \*, for  
30 a period of five (5) years from the date hereof for the purpose above-mentioned and improvement in such manner as he may deem proper. It is a *condition of this lease that it is non-transferable to other than the legal heirs of the lessee*, and that, *in time of war only*, the Navy Department shall have, without cost, *full and free use* of said site with all improvements thereon.

The aforesaid site of land is described and bounded as follows: Beginning at the point No. 83 on the western boundary line of the San Geronimo Naval Reservation and extending along said boundary line N. 23° 29' E. to the sea; thence easterly along and outside the ocean shore line and around and outside of the walls and rocks of the old fort



San Geronimo to its outer southwest corner on the Laguna; thence from said outer southwest corner in a straight line N.  $71^{\circ} 46'$  W. and outside of the old wall to the point No. 88 where said line intersects the old wall; thence ninety (90) feet S.  $74^{\circ} 40'$  W. along the wall and moat to the angle at point No. 87; thence ninety-nine (99) feet S.  $7^{\circ} 09'$  W. along the old wall moat to the corner of the wall at point No. 96; thence along the old moat in a straight line N.  $60^{\circ} 45'$  W. to a point No. 85 on the western boundary line of the San Geronimo Naval Reservation; thence N.  $23^{\circ} 29'$  E. along said boundary line to point No. 83, the place of beginning.

This lease is made pending complete transfer by Congress of title to said site to the lessee, which transfer meets the approval of the Navy Department.

Signed, sealed and delivered at Washington, D. C., this 26th day of August, A. D., 1919.

(Sgd.)

F. D. ROOSEVELT,

*Acting Secretary of the Navy.*

(Sgd.) GRAHAM EGERTON,

*Solicitor, as to F. D. Roosevelt,*

*Acting Secretary of the Navy.*

EXHIBIT "A."

Copy.

Navy Department, Naval Communication Service.

U. S. Naval Radio Station,  
San Juan, Porto Rico, July 10, 1919.

Inclosures 2.

From: Lieutenant-Commander Virgil Baker, U. S. N.,  
Ret.

To: The Secretary of the Navy.

Via: The Governor of the Virgin Islands and The Director of Naval Communications.

Subject: Request for lease of small section of Naval Reservation for construction of private quarters.

31 Inclosures: (a) Proposed lease in quadruplicate.  
(b) Chart of Naval Reservation.

1. Your approval is respectfully requested of the inclosed lease on a small section of the Naval Reservation at San

Juan, Porto Rico, which section, in all probability, will never be required for Naval purposes, and of which I desire to have control in order to improve and to construct thereon a residence for my personal use.

2. The greater part of the section of ground desired is — and swampy and is a breeding place for mosquitoes. After a heavy rain a large part of the section is flooded and remains so for several days. It would cost about \$3,000.00 for grading and filling and draining in order to put that section in good sanitary condition. This I would guarantee to do to the satisfaction of the Department.

3. I would also guarantee to erect thereon a permanent concrete residence of approved type of construction and costing not less than \$10,000. I would reside in this residence with my family, and during such residence, I would waive all claim to other quarters or to commutation of quarters.

4. This section is the part of the Naval Reservation most remote from the Naval Radio Station and from San Juan, and is the least useful from a Naval point of view, and I know of no naval purpose for which it could be used to advantage, even after the considerable cost of putting it in good sanitary condition.

5. Authority for the construction of two sets of Government quarters for Officers has already been requested and has been approved by the Director of Naval Communications. This lease would not interfere with the site selected for these two sets of quarters, which site requires but little grading and where there is more than ample space for five sets of Government quarters in case they should be necessary in the future. The last-mentioned site is nearest the main highway, the trolley line, and the Naval Radio Station.

6. The Government quarters whose construction has been approved will not be enough to provide quarters for all the Officers stationed at this District Center Station. So the residence which I propose to construct would provide an additional set of quarters, at least while I am on active duty here.

7. Whether retained on active duty or not I intend to remain in Porto Rico, and shall always consider myself available for call to active duty in case my services are needed.

8. It might possibly be of some advantage to the Service to have living near the Naval Reservation a Retired Officer who would be at all times available for active duty if needed. Such was the case on our entry into the war with Germany, at which time I was the only Commissioned Line Officer of the Navy in Porto Rico. I was immediately ordered to active duty and was given charge of all the activities of the Navy on shore in Porto Rico. These included Naval Communication, Cable Censorship, Naval Intelligence, Routing of Vessels, and Mail Censorship.

32 9. In considering my request for this lease I request that consideration be given also to the fact that I served in the Volunteer Army during the Spanish-American and Filipino Wars and saw active service in the Philippines. I was honorably discharged in November, 1899, by reason of the muster out of the Regiment.

VIRGIL BAKER.

EXHIBIT "D."

Copy.

Comptroller General of the United States, Washington.

A-11668.

March 20, 1926.

Lieutenant-Commander Virgil Baker, U. S. Navy, (Retired), applied February 23, 1926, for reconsideration of decisions of this office dated January 29, 1926, certifying him indebted to the United States in the sum of \$6,367.88, on account of unauthorized compensation received by him as an inspector of hulls in the Department of Commerce while he was also serving on active duty as a retired officer of the Navy and certifying him indebted in the sum of \$1,383.33, on account of erroneous payment of rental allowance received by him for the period from May 6, 1924, to June 30, 1925.

It is urged that the charge of \$6,367.88 with respect to compensation received as an inspector of hulls is not correct for the reason the act of May 31, 1924, 43 Stat. 245, amending the act of July 31, 1894, 28 Stat. 205, was designed and intended to apply to the class of retired officers therein designated at all times subsequent to the date of



their retirement and without regard to the question of whether they should be on active duty or on inactive status after being retired. The act of May 31, 1924, *supra*, provided:

“That section 2 of the Legislative, Executive, and Judicial Appropriation Act, Approved July 31, 1894, is amended by adding at the end thereof a new sentence to read as follows: ‘Retired enlisted men of the Army,  
33 Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement.’ ”

Section 2 of the act of July 31, 1894, 28 Stat. 205, provided that:

“Sec. 2. That the pay of assistant messengers, firemen, watchmen, laborers, and charwomen provided for in this Act, unless otherwise specially stated, shall be as follows: For assistant messengers, firemen, and watchmen, at the rate of seven hundred and twenty dollars per annum each; for laborers, at the rate of six hundred and sixty dollars per annum each, and for charwomen, at the rate of two hundred and forty dollars per annum each. No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate.”

The phrase in the above act as to which it is claimed an erroneous construction has been made is the phrase “during such retirement.” As an aid in determining whether it was the intention of the Congress to make this phrase applicable both to periods of active duty and to periods of inactive duty it is instructive to note the original purpose



intended to be served by the act as disclosed in Senate Report No. 254, 68th Congress, which is as follows:

“The Committee on Military Affairs, to which was referred the bill (S. 2450) to amend section 2 of the legislative, executive, and judicial appropriation act approved July 31, 1894, having considered the same, report thereon favorably with the recommendation that the bill do pass without amendment.

“A similar bill was reported to the Senate by your committee during the Sixty-seventh Congress and the report accompanying that measure is appended hereto and made a part of this report, as follows:

“The bill was introduced at the suggestion of representatives of the American Legion and the purpose of it is explained in the following memorandum presented by them:

34      “ ‘The men affected by this bill are about 12 old-time non-commissioned officers, who have been retired as enlisted men for length of service. All of these men are veterans of the Spanish-American War, the Philippine insurrection, and the World War; two at least are veterans of Indian wars. All served as officers during the World War and returned to their grades as retired enlisted men after the war was over. These bills do not call for any appropriation or expenditure of funds.

“ ‘It is evident from a study of section 2 of the act of 1894 that Congress had no intention, nor even had in mind including retired enlisted men in the provisions of the act, which provides that no person holding an office with the Government shall hold any other office with compensation over \$2,500. The Comptroller General has recently held that a retired enlisted man, as such, holds an office under the Government.

“ ‘Due to their ability and fitness in administrative and financial matters, certain of these men have been appointed under congressional and civil-service authority to offices of trust in the Veterans’ Bureau, Department of Agriculture, and other departments, and have proved to be valuable men. Under the comptroller’s decision they must now suffer a reduction in salary below many others doing similar or less important work.

“‘It is surely not the intent of Congress or the public that these men who have spent the better part of their lives in the military service should now be discriminated against on account of being retired enlisted men. It is the intent of this bill to rectify this discrepancy and to place these men on an equal footing for employment as other American citizens of equal ability.’

“A letter requesting the passage of this bill has been received from the Director of the Veterans’ Bureau, Colonel Forbes, which is included in this report as follows:

“United States Veterans’ Bureau, Washington.

January 15, 1923.

“Hon. James W. Wadsworth, Jr.,  
Chairman Committee on Military Affairs,  
United States Senate, Washington, D. C.

“DEAR SENATOR WADSWORTH:

I desire to invite your attention to Senate bill 4315, introduced by you and which is now before your committee.

“This bill allows retired enlisted men of the Army the same privileges of occupying a Government position or office as those enjoyed by the ordinary citizen. The bill has particular application to a limited number of former non-commissioned officers employed in this bureau. These men are all of exceptional ability and particularly capable of filling positions of importance in the United States Veterans’ Bureau because of their experience gained through long service, and it does not seem just that they should be discriminated against because of their service to the country.

“I sincerely hope you will find it possible to act favorably with regard to this bill at an early date, in order that the men who have so forcibly demonstrated their devotion to these United States may be treated equitably.

“Very truly yours,

C. R. FORBES,  
*Director.*

“Your committee is convinced of the justice of this legislation and urges that it be acted upon by the Senate at an early date.”

From the foregoing it would seem to be obvious that the bill in its original form was designed to afford a measure of relief to retired enlisted men, not on military duty serving the Government in the capacity of civilian clerks and who were, in the opinion of the committee, being unfairly discriminated against as a result of the operation of the act of July 31, 1894. The report expressly adopts the view that the purpose of the act was to prevent discrimination against retired enlisted men. It does not express any intention of conferring upon them the privilege of serving the Government *actively* in two separate official capacities and since this is a privilege which is denied by section 1763, Revised Statutes, and the act of July 31, 1894, to other servants of the Government in receipt of \$2,500 per annum or more in one official capacity, it is evident that the construction contended for would not remove discrimination but would create discrimination against all other officers and employees of the Government. The committee report quoted, mentions only enlisted men but this is due to the fact that the bill in its original form made provision only for retired enlisted men and contained no provision relating to retired officers. That the amendment of the bill, however, to include the retired officers designated did not

36 otherwise broaden the intended scope of the original bill seems evident from the fact that there was no change in phraseology of the bill other than the inclusion of the two classes of officers. There was no additional committee report relative to the inclusion of the retired officers and no reference thereto was made in the debate on the amendment to the bill. The conclusion seems inescapable that there was no intention to broaden the scope of the original bill otherwise than simply to include the designated retired officers within its operation. See 65 Congressional Record, pages 9137 and 9279.

It is further urged that in the case of Lieutenant-Commander Baker, the two offices held by him, instead of being incompatible, actually derived a benefit each from the other in having the duties of both performed by the same officer. It would seem almost inescapable that in the large majority of cases the performance of active military duty could not be otherwise than incompatible with the performance of



any other duties required to be performed by the same officer as the incumbent of a civil office. See *Webster v. United States*, 28 Ct. Cls. 25; *Winchell v. United States*, id. 30; 24 Op. Atty. Gen. 12. The Supreme Court has indicated incompatibility exists "when the services rendered or which might be required under them" conflict. *Badeau v. United States*, 130 U. S. 439, 451. This objection as to incompatibility of duties is not encountered when the act is construed to apply only to periods while in an inactive status for the purpose of removing discrimination as reported by the Senate Committee on Military Affairs.

The construction for which the claimant contends, viz., that the act applies to all periods while on the retired list without regard to the question of active or inactive status—would appear to defeat the very purpose of Congress in limiting the application of the act to such officers as are retired for injuries or incapacity incurred in line of duty.

37 From the fact that such retired officers only and not retired officers generally are accorded the privilege of holding two offices with compensation attached, it would seem to be evident that the purpose of the act, so far as it related to officers, was to afford a measure of relief from the handicap which such officers, because of their injuries or incapacity, must experience in engaging in the ordinary occupations of civil life. If, however, an officer, retired for injuries or incapacity, is so far recovered as to be able to render full service as a military officer on active duty and in addition thereto the service required of him as a civil officer, obviously the supposed handicap from injury or incapacity must have disappeared.

It is further contended on behalf of the claimant that when an officer has once been retired his status as a retired officer continues notwithstanding the fact that he may be called to, and perform, active duty, and that the decision of January 29, 1926, in this case, making a distinction between the status of a retired officer on active duty and the status of a retired officer on inactive status, is, therefore, erroneous. If it is true that the performance of active duty by a retired officer does not operate to place him upon the active list, and without deciding this question, the decision of January 29, 1926, now under review is not in any way in conflict with such a principle. Said decision



held that the act of May 31, 1924, was intended to apply to certain retired officers only while they were on inactive status. It was not concerned with the question of whether the retired status of the officer was changed by the performance of active duty but was concerned simply with the fact that the law as reported by the committee and enacted applied only to periods while in an inactive status. The case of *Roget v. The United States*, 148 U. S. 167, cited by the claimant in this connection, concerned the question  
38 of whether active duty performed by a retired officer subsequent to his retirement should be considered for longevity purposes in determining the retired pay to which he was entitled under the act of March 3, 1873, 17 Stat. 547, which provided that certain retired officers should be "entitled to seventy-five per centum of the present sea-pay of the grade or rank which they held at the time of their retirement." Clearly the determination of the matter there involved cannot affect the question in issue here.

The normal status of retired military personnel is inactive. 5 Comp. Gen. 408. *Geddes v. United States*, 38 Ct. Cls. 428. It must be assumed, therefore, in the absence of any express provision to the contrary, that the act of May 31, 1924, was intended to be applied to retired personnel in its normal status and that the phrase "during such retirement" was used to limit the dual status to periods of actual retirement from active military duty.

With reference to the item of \$1,383.33, representing erroneous payment of rental allowance received by the officer for the period from May 6, 1924, to June 30, 1925, it is urged that the decision of January 29, 1926, is in error for the reason that the quarters occupied by the officer for this period were occupied under the terms of a lease executed July 15, 1921, and that said lease did not contain any mention of an agreement by the officer to waive his right to commutation or rental allowance as a part of the consideration for the lease. On December 3, 1919, Lieutenant-Commander Baker in a communication to the Navy Department, requesting a permanent lease, made the following representations:

"1. Your approval is requested of the transfer to me by permanent title, or by permanent lease, subject to certain

conditions during war, of the small tract of land on which I have been granted a 5-year lease by the Navy Department for a nominal sum.

39       “2. In return for such permanent title or lease I would obtain immediately and transfer to the Navy Department *full title* to the 9-acre tract of land already selected as a site for a receiving and distant-control radio station in Porto Rico. In addition I *would obtain immediately* and transfer to the Navy Department, perpetual easements for laying the underground receiving systems in the surrounding tracts of land included in a circle whose radius is 2,000 feet and whose center is at the point on the radio site where the radio building is to be located.

“3. *Options have been obtained which enable me to make these transfers* to the Navy Department immediately, so that any delay necessary to transferring to me title to the tract of land I have leased need not delay the construction of the distant-control station.

“4. On the tract of land on which I have the lease I wish to build a *residence for my personal use* and to make sanitary and other improvements amounting to *over \$12,000*, and permanent title to the small tract of land is desired in order to protect that investment.

“5. I would agree to waive commutation of quarters while occupying the property, and, in time of war to place at the disposal of the Department, free of cost, the entire property, and all improvements thereon, including the residence.”

While it is true that express mention does not appear to have been made in the lease of July 15, 1921, as executed, of the preliminary offer to waive commutation of quarters, it is to be observed that neither was any such express mention of a waiver of commutation made in the lease executed August 26, 1919, for a term of five years and the officer, though on active duty during the period for which that lease was in effect, did not receive nor claim commutation of quarters. The fact is that for the period from May 6, 1924, to June 30, 1925, the officer occupied Government quarters which he had previously admitted were adequate and satisfactory as quarters to be occupied by him as an officer of the Navy. The mere fact that by a lease he ob-

tained in these particular premises a right which did not accrue to him as an officer of the Navy, viz., the right to occupy the quarters for periods during which he was not on active duty as an officer,—does not alter the fact that he had agreed to and did accept and occupy these quarters as adequate and satisfactory to him as an officer of the Navy on active duty. Having occupied quarters in kind the officer cannot also be paid commutation or rental allowance in lieu of quarters.

Accordingly the decisions of January 29, 1926, are adhered to and the charges raised in pursuance thereof will be continued and collection be proceeded with.

(Signed) J. R. McCARL,  
*Comptroller General of the United States.*

*Separate Answer of Curtis D. Wilbur, Secretary of the Navy.*

Filed May 13, 1926.

\* \* \* \* \*

The defendant Curtis D. Wilbur, as Secretary of the Navy, for answer to the Rule to Show Cause and the Bill of Complaint herein, says:

1. He admits the averments of fact in paragraph 1 of the bill except in so far as they refer directly to defendant J. Raymond McCarl, Comptroller General of the United States, as to which he is informed that said McCarl will answer separately.

2. He admits the averments of fact in Paragraph 2 of the bill.

3. He admits that during the entire period of plaintiff's service as a naval officer his pay and allowances have been paid up to and until the withholding thereof as described in the bill of complaint filed herein. He admits that during the entire period within which plaintiff avers that his pay and allowances have been withheld, extending up to the time of the filing of this bill of complaint, Congress has appropriated funds covering his pay and allowances and the money for the payment thereof has been actually available and has been turned over to and is



now in the possession of Thomas Cochran, a disbursing officer of the Navy, but he avers that Congress has made no specific appropriation for the payment of the pay and allowances of the plaintiff. He admits that the said Thomas Cochran is the disbursing officer of the United States Navy in charge of the account of the plaintiff. He admits that the said Cochran is a subordinate of this defendant and is subject to his lawful commands, orders, and instructions.

He is advised that the other allegations in Paragraph 3 are mere conclusions of law and that no answer thereto is necessary.

4. The averments of Paragraph 4 of the bill refer directly to defendant McCarl and he is informed that the said McCarl will answer separately with respect thereto.

5. He has no knowledge of the amounts paid plaintiff as rental allowance during the period in question. He admits that the lease mentioned in paragraph 5 of the bill of complaint is being litigated between the Government, represented by the Department of Justice, and the plaintiff, in the United States District Court for the District of Porto Rico. He admits that the plaintiff was recalled to active duty at San Juan from May 6, 1914, to and including June 30, 1925, and during said time he resided upon the premises known as Fort San Geronimo in the Island of Porto Rico. Answering said paragraph further, defendant avers that the Navy Department secured from the War Department by five year lease dated June 1, 1917, certain lands near San Geronimo Naval Reservation. A second lease was executed March 18, 1919, between the two departments whereby the Navy Department secured the land for a period of 99 years on recommendation of plaintiff who was the senior naval

officer present at San Juan that the land was necessary "for the operation of a Radio Telegraph Station and for other naval purposes." On September 6, 1919, the Navy Department requested the War Department to transfer title to it of the aforesaid land pursuant to the provisions of the act of July 11, 1919, 41 Stat. 129, which authorized interchange of lands for certain purposes between the Army and Navy. The transfer was effected on December 15, 1919.

After the execution of the aforesaid 99 year lease of March 18, 1919, plaintiff wrote a letter dated July 10, 1919,

a copy of which is attached as Exhibit "A," to the Secretary of the Navy requesting execution of a lease to him of a part of the land obtained from the War Department. Among other things, plaintiff stated in said letter if the lease was executed:

"I would also guarantee to erect thereon a permanent concrete residence of approved type of construction and costing not less than \$10,000. I would reside in this residence with my family, and during such residence, I would waive all claim to other quarters or to commutation of quarters."

The lease was approved and executed on August 26, 1919, for a term of five years. A copy of said lease is attached hereto as Exhibit "B." Plaintiff was on active duty as an officer of the Navy during the period for which this lease was in effect and in so far as this defendant is informed he neither claimed nor received commutation of quarters and did not occupy other Government quarters.

After the Navy Department had requested on September 6, 1919, as aforesaid, that the land at San Juan, including the tract theretofore leased by it to plaintiff be permanently transferred to it, plaintiff wrote a letter dated December 3, 1919, to the Bureau of Steam Engineering, Navy Department, requesting that the land he then held under the lease of August 26, 1919, be permanently transferred to him. A

copy of said letter is hereto attached as Exhibit "C."  
43 Plaintiff stated in said letter that if the transfer was made:

"I would agree to waive commutation of quarters while occupying the property, and, in time of war to place at the disposal of the Department, free of cost, the entire property, and all improvements thereon."

A "permanent" lease was approved and executed July 15, 1921, by Theodore Roosevelt, Acting Secretary of the Navy, purporting to lease the said tract of land to plaintiff, his heirs and assigns for a period of 999 years, a copy of said lease being attached hereto and made a part hereof, marked Exhibit "D," and as averred by plaintiff, the Department of Justice, acting on behalf of the United States, has in an Equity proceeding now pending in the District Court for

the District of Porto Rico, brought suit to cancel said lease on the grounds, among others, that it was not authorized by Section 5 of the Naval Appropriation Act of July 12, 1921, 42 Stat. 139, 140, and the act of August 29, 1916, 39 Stat. 559, 560, and that there was no consideration for the so-called lease.

6. He has no knowledge of the facts alleged in Paragraph 6 of the bill of complaint other than as contained in decision of the Comptroller General, dated January 29, 1926. He denies that a copy of said decision of the Comptroller General was transmitted to Thomas Cochran by him or through his order, but admits that a copy of said decision was transmitted in the course of usual procedure by the Bureau of Supplies and Accounts to Thomas Cochran for his information and he is advised that he is not required to answer plaintiff's conclusions of law.

7. He denies that a copy of said decision of the Comptroller General was transmitted to Thomas Cochran by him or through his order, but admits that a copy of said decision was transmitted by the Bureau of Supplies and Accounts to Thomas Cochran for his information and

44 he is advised that he is not required to answer plaintiff's conclusions of law. He has no knowledge of the remaining averments in Paragraph 7 of the bill of complaint other than as contained in decision of the Comptroller General dated January 29, 1926, and same are neither admitted nor denied.

8. He neither admits nor denies such of the averments in Paragraph 8 as refer directly to defendant McCarl, being informed that the said defendant will answer separately with respect thereto. He is advised that he is not required to answer plaintiff's conclusions of law. In answer to the fourth sentence of paragraph 8 of the bill of complaint he admits that Lieutenant Commander Thomas H. Cochran, Supply Corps, U. S. N. in letter of March 6, 1926, signed by "T. E. Wright" for Thomas Cochran, advised the plaintiff that he did not feel justified in continuing to issue checks for pay and allowances until further instructions were received from Washington. He has no knowledge as to any communication received by Thomas Cochran from the Comptroller General with reference to the alleged indebtedness. In answer to the fifth sentence of Paragraph 8



of the bill of complaint he denies that he has failed and refused to instruct Thomas Cochran to issue to the plaintiff his pay and allowances alleged to be due him for the reason that the first information received by the Secretary of the Navy regarding the withholding of the pay and allowances of the plaintiff was contained in the bill of complaint, a copy of which was received on April 21, 1926. In view of the fact that action has been taken in the Supreme Court of the District of Columbia he deems it proper to withhold any action in connection with the withholding of the pay of the plaintiff, pending a determination of the issue by the Court.

9. He is advised that the matters set forth in paragraph 9 of the bill of complaint are argumentative and mere  
45 conclusions which he is not required to answer.

Wherefore, having fully answered said bill of complaint and rule to show cause, this defendant prays that said rule be discharged and said bill be dismissed with costs.

CURTIS D. WILBUR.

PEYTON GORDON,

*United States Attorney;*

LEO A. ROVER,

*Assistant United States Attorney,*

*Attorneys for Defendant Curtis D. Wilbur.*

DISTRICT OF COLUMBIA, ss:

I, Curtis D. Wilbur, Secretary of the Navy, being first duly sworn according to law, on oath depose and say that I have read the foregoing answer to the bill of complaint and rule to show cause subscribed to by me, and know the contents thereof, and that the matters and things therein stated I verily believe to be true.

CURTIS D. WILBUR.

Subscribed and sworn to before me this 13th day of May, 1926.

[NOTARIAL SEAL.]

WILLIAM J. GRAHAM,

*Notary Public, D. C.*

## Copy.

Navy Department, Naval Communication Service.

U. S. Naval Radio Station,  
San Juan, Porto Rico, July 10, 1919.

Inclosures 2.

From: Lieutenant-Commander Virgil Baker, U. S. N.,  
Ret.

To: The Secretary of the Navy.

Via: The Governor of the Virgin Islands and The Director of Naval Communications.

Subject: Request for lease of small section of Naval Reservation for construction of private quarters.

Inclosures: (a) Proposed lease in quadruplicate.

(b) Chart of Naval Reservation.

1. Your approval is respectfully requested of the inclosed lease on a small section of the Naval Reservation at San Juan, Porto Rico, which section, in all probability, will never be required for Naval purposes, and of which I desire to have control in order to improve and to construct thereon a residence for my personal use.

2. The greater part of the section of ground desired is low and swampy and is a breeding place for mosquitoes. After a heavy rain a large part of the section is flooded and remains so for several days. It would cost about \$3,000.00 for grading and filling and draining in order to put that section in good sanitary condition. This I would guarantee to do to the satisfaction of the Department.

3. I would also guarantee to erect thereon a permanent concrete residence of approved type of construction and costing not less than \$10,000. I would reside in this residence with my family, and during such residence, I would waive all claim to other quarters or to commutation of quarters.

4. This section is the part of the Naval Reservation most remote from the Naval Radio Station and from San Juan, and is the least useful from a Naval point of view, and I know of no naval purpose for which it could be used to

advantage, even after the considerable cost of putting it in good sanitary condition.

5. Authority for the construction of two sets of Government quarters for Officers has already been requested and has been approved by the Director of Naval Communications. This lease would not interfere with the site selected for these two sets of quarters, which site requires but little grading and where there is more than ample space for five sets of Government quarters in case they should be necessary in the future. The last-mentioned site is nearest the main highway, the trolley line, and the Naval Radio Station.

47        6. The government quarters whose construction has been approved will not be enough to provide quarters for all the Officers stationed at this District Center Station. So the residence which I propose to construct would provide an additional set of quarters, at least while I am on active duty here.

7. Whether retained on active duty or not I intend to remain in Porto Rico, and shall always consider myself available for call to active duty in case my services are needed.

8. It might possibly be of some advantage to the Service to have living near the Naval Reservation a Retired Officer who would be at all times available for active duty if needed. Such was the case on our entry into the war with Germany, at which time I was the only Commissioned Line Officer of the Navy in Porto Rico. I was immediately ordered to active duty and was given charge of all the activities of the Navy on shore in Porto Rico. These included Naval Communication, Cable Censorship, Naval Intelligence, Routing of Vessels, and Mail Censorship.

9. In considering my request for this lease I request that consideration be given also to the fact that I served in the Volunteer Army during the Spanish-American and Filipino Wars and saw active service in the Philippines. I was honorably discharged in November, 1899, by reason of the muster out of the Regiment.

VIRGIL BAKER.



## (EXHIBIT "B".)

Copy.

*Lease.*

San Geronimo Naval Reservation, San Juan, Porto Rico.

Whereas, Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), is desirous of having control of a small site of land on the San Geronimo Naval Reservation at San Juan, Porto Rico, for the purpose of erecting a residence thereon, for improving the sanitary conditions of said site of land, and for making other improvements thereon, all of which will be of benefit to the entire Naval Reservation, and

Whereas, the below-described tract of land on the San Geronimo Naval Reservation is not now required and in all foreseeable probability will never be required for Government use; and *having the public interests in view*, and in *consideration* of the *sanitary and other improvements* which the said Lieutenant-Commander Virgil Baker proposes to make, and in *consideration* of the *payment* by him of a *total rental* of one dollar (\$1.00), and in *recognition of services* rendered by him in the war with the German Empire and in other wars and expeditions, said site of land, with right of way thereto is hereby leased in accordance with law, to the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), and his heirs \* \* \*, for a period of five (5) years from the date hereof for the purpose above-mentioned and improvement in such manner as he may deem proper. It is *a condition of this lease that it is non-transferable to other than the legal heirs of the lessee*, and that, *in time of war only*, the Navy Department shall have, without cost, *full and free use* of said site with all improvements thereon.

48      The aforesaid site of land is described and bounded as follows: Beginning at the point No. 83 on the western boundary line of the San Geronimo Naval Reservation and extending along said boundary line N. 23° 29' E. to the sea; thence easterly along and outside the ocean shore line and around and outside of the walls and rocks

of the old fort San Geronimo to its outer southwest corner on the Laguma; thence from said outer southwest corner in a straight line N.  $70^{\circ} 46'$  W. and outside of the old wall to the point No. 88 where said line intersects the old wall; thence ninety (90) feet S.  $74^{\circ} 40'$  W. along the wall and moat to the angle at point No. 87; thence ninety-nine (99) feet S.  $7^{\circ} 90'$  W. along the old wall moat to the corner of the wall at point No. 96; thence along the old moat in a straight line N.  $60^{\circ} 45'$  W. to a point No. 85 on the western boundary line of the San Geronimo Naval Reservation; thence No.  $23^{\circ} 29'$  E. along said boundary line to point No. 83, the place of beginning.

This lease is made pending complete transfer by Congress of title to said site to the lessee, which transfer meets the approval of the Navy Department.

Signed, sealed and delivered at Washington, D. C., this 26th day of August, A. D. 1919.

(Sgd.)

F. D. ROOSEVELT,  
*Acting Secretary of the Navy.*

(Sgd.) GRAHAM EGERTON,  
*Solicitor.*

*As to F. D. Roosevelt, Acting Secretary of the Navy.*

EXHIBIT "C."

Copy.

N. S. E. 11c.

Address District Communication Superintendent and refer to No.

Inclosures.

Navy Department, United States Naval Communication  
Service.

Office of District Communication Superintendent.

U. S. Naval Radio Station,  
San Juan, Porto Rico, December 3, 1919.

From: Lieutenant-Commander Virgil Baker, U. S. N.,  
Ret.

To: Bureau of Steam Engineering.

Via: Governor of the Virgin Islands.

Subject: Requests authority to acquire and transfer to the Navy Department a site for a distant-control radio station in exchange for a section of San Geronimo Naval Reservation already leased to him.

References: (a) 1st End. dated 7/11/19, of Governor, Virgin Islands, approving lease.

(b) D. N. C. 2nd End. 33667-239, dated 8/25/19, approving lease.

(c) Bu. S. E. 3d End. 441677-920-4-W, dated 8/26/19, approving lease.

(d) Lease granted 8/26/19, which provides also for complete transfer.

1. Your approval is requested of the transfer to me by permanent title, or by permanent lease, subject to certain conditions during war, of the small tract of land on which I have been granted a 5-year lease by the Navy Department for a nominal sum.

2. In return for such permanent title or lease I would obtain immediately and transfer to the Navy Department full title to the 9-acre tract of land already selected as a site for a receiving and distant-control radio station in Porto Rico. In addition I would obtain immediately and transfer to the Navy Department perpetual easements for laying the underground receiving systems in the surrounding tracts of land included in a circle whose radius is 2,000 feet and whose center is at the point on the radio site where the radio building is to be located.

3. Options have been obtained which enable me to make these transfers to the Navy Department immediately, so that any delay necessary to transferring to me title to the tract of land I have leased need not delay the construction of the distant-control station.

4. On the tract of land on which I have the lease I wish to build a residence for my personal use and to make sanitary and other improvements amounting to over \$12,000, and permanent title to the small tract of land is desired in order to protect that investment.

5. I would agree to waive commutation of quarters while occupying the property, and, in time of war to place at the disposal of the Department, free of cost, the entire property, and all improvements thereon, including the residence.

6. Whether retained on active duty or not I intend to re-



main in Porto Rico, and shall always consider myself available for orders to active duty in case I am needed.

7. It might be of some advantage to the Service to have living adjacent to the Naval Reservation a retired officer who would be at all times available for active duty if needed, especially as there is no other permanently commissioned Line Officer of the Navy stationed or residing in Porto Rico. Such was the case at the time of our entry into the war with Germany, when I was immediately ordered to active duty and was given charge of all the activities of the Navy on shore in Porto Rico. These included Naval Communication, Cable-Censorship, Naval Intelligence, Routing of Vessels, and mail Censorship.

8. Attention is invited to the 5th paragraph of the lease I now have, which reads, "This lease is made pending complete transfer by Congress of title of the lessee which transfer meets the approval of the Navy Department."

(Sgd.)

VIRGIL BAKER.

50

EXHIBIT D.

*A Lease Granted under Special Authority of the Congress to Lieutenant-Commander Virgil Baker, United States Navy (Retired), for Certain Considerations and in Recognition of Service.*

In the City of Washington, District of Columbia, on the fifteenth day of July, nineteen hundred and twenty-one, Before me, William B. Crowell, a Notary-Public in and for the District of Columbia, at Washington, D. C., having my residence and office in the District of Columbia, and before the witnesses who will be named, there appear as the party of the first part, Theodore Roosevelt, Acting Secretary of the Navy of the United States of America, of age and residing in this city, representing the United States of America and the Navy Department of the United States, which representation he will prove whenever necessary; as the party of the second part, Lieutenant-Commander Virgil Baker, United States Navy (Retired), who is of age, married with Mrs. Stella May Baker, and a resident of the City of San Juan, in the Island of Porto Rico.

I certify as to my personal knowledge of the Parties appearing herein, and as to their status and residence. They

assure me that they have the full enjoyment of their civil rights together with the free management of their properties, and that they have the necessary legal capacity for this Act, and they have, in my judgment, such capacity, and the party of the first part states:

First, That the Navy Department of the United States of America is actually the Owner and In Possession Of the following tract of land situated in the Island of Porto Rico: Tract of Land known as the San Geronimo Naval Reservation and bounded as follows: On the North by the Sea; on the East by the small inlet known as the Laguna; on the South by the San Antonio Channel; and on the West by tracts of land belonging to the People of Porto Rico, and by a tract of land belonging to the Treasury Department of the United States, and by the Military Reservation of San Juan, Porto Rico. Said Tract of Land, the San Geronimo Naval Reservation, is described by metes and bounds as follows: Beginning at Monument number eighty-four (84) on the Military Road as shown on the Military Chart of the Military Reservation of San Juan, Porto Rico, and extending north twentythree degrees twentynine minutes east (N.  $23^{\circ}$ - $29'$  E.) six hundred thirtythree (633) feet to Monument number eightythree (83); thence continuing north twentythree degrees twentynine minutes east (N.  $23^{\circ}$ - $29'$  E.) three hundred ninetyseven (397) feet to the Sea to point number eightynine (89); thence easterly along the Sea to point number ninety (90) on the rocks in front of the old Fort San Geronimo; thence south thirtyeight degrees twentynine minutes west (S.  $38^{\circ}$ - $29'$  W.) twelve hundred forty (1,240) feet across the Laguna to point number ninetyone (91) on the corner of the old Fort San Antonio; thence south sixtysix degrees twentynine minutes west (S.  $66^{\circ}$ - $29'$  W.) three hundred thirtyseven (337) feet to point number ninetytwo (92) on the northern abutment of the railroad bridge; thence north seventyseven degrees five minutes west (N.  $77^{\circ}$ - $5'$  W.) six hundred seventysix and five-tenths (676.5) feet along the San Antonio Channel to point number ninetythree (93) on the bulkhead line of San Antonio Channel; thence north twentythree degrees twentynine minutes east (N.  $23^{\circ}$ - $29'$  E.) nine hundred sixtytwo and five-tenths (962.5) feet to monument number eightyfour (84), the point of beginning.

## Title.

Second, That said tract of land, the San Geronimo Naval Reservation, was acquired by the Navy Department of the United States by transfer from the War Department of the United States by an Order dated December fifteenth, nineteen hundred and nineteen, signed by Benedict Crowell, Acting Secretary of War, said Order having been issued under authority of Congress as contained in the Naval Appropriation Act approved by the President of the United States on July 11, 1919, said transfer having been requested by the Secretary of the Navy in his letter dated October twentysecond, nineteen hundred and nineteen.

Third, That said tract of land, the San Geronimo Naval Reservation, is not affected by any other lease, lien, mortgage, or other liability or encumbrance than the lease executed August twentysixth, nineteen hundred and nineteen in favor of the Party of the Second Part.

Fourth, That in the records existing in the Navy Department of the United States at Washington, D. C., it appears that on August twentysixth, nineteen hundred and nineteen, there was executed under the seal of the Navy Department by the Acting Secretary of the Navy in favor of the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), a lease of a site of land not otherwise required for Naval purposes within said San Geronimo Naval Reservation for certain considerations as stated in said lease, and in recognition of services rendered by him in the war with the German Empire and in other wars; and there appears in and as a part of said lease the following clause and stipulation: "This lease is made pending complete transfer by Congress of title to the lessee, which transfer meets the approval of the Navy Department."

Fifth, That in the Records existing in the Navy Department of the United States at Washington, D. C., and in the Registry of Property at San Juan, Porto Rico, it appears also that on the seventh day of June, nineteen hundred and twenty, before the Notary Don Eduardo Acuña Aybar, at San Juan, Porto Rico, the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), and his wife, Stella May Baker, executed a deed number twentyeight transferring



and ceding to the United States of America, represented by the Secretary of the Navy, complete and legal title to a tract of land composed of two adjoining parcels of  
52 eight acres and one acre, in the Island of Porto Rico, and a real, positive, and continuous easement on a surrounding circular tract of land composed of two hundred seventynine (279) acres to be used in the construction and operation of a distant-control radio station. Said transfer was made in consideration of the signing by the Secretary of the Navy of the Addendum dated December fifteen, nineteen hundred and nineteen, to the lease executed August twentysixth, nineteen hundred and nineteen, in favor of the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), of a site of land within said San Geronimo Naval Reservation; and in consideration of complete transfer to him, as provided in said lease, of full and complete title to said site of land and to such additional adjacent land as the Secretary of the Navy may consider necessary and proper in order to provide a right of way thereto and to provide for the proper sanitation of the adjacent land, provided the Congress should authorize such transfer of title. Under the foregoing stipulations and conditions said transfer of title and easements was accepted by the Secretary of the Navy in behalf of the United States of America on the nineteenth day of August, nineteen hundred and twenty, at Washington, D. C., before William B. Crowell, a Notary-Public in and for the District of Columbia.

Therefore, In accordance with what has been stipulated and agreed to, as hereinbefore stated, in the lease executed August twentysixth, nineteen hundred and nineteen, by the Secretary of the Navy in favor of the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), and in accordance with what was stipulated as a consideration in the deed number twentyeight executed on the seventh day of June, nineteen hundred and twenty, by the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), and his wife, Stella May Baker, transferring to the United States of America certain lands in the Island of Porto Rico as a site for a distant-control radio station; and the Parties appearing herein having mutually agreed thereto:

## Lease.

The Secretary of the Navy, representing the United States of America and the Navy Department, and having been duly authorized by the Congress under the provisions of Section 5 of the Naval Appropriation Act approved by the President of the United States on July 12, 1921, does hereby lease to the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), and his heirs and assigns, for a period of nine hundred ninety-nine (999) years from the date hereof, for such use and improvement as they may deem proper, the following-described site of land, with right of way thereto, which site of land is not otherwise required for Naval purposes and is located in the San Geronimo Naval Reservation in the Island of Porto Rico.

Site of land bounded on the north by the sea, on the east by the small inlet known as the Laguna, on the south by the main Naval Reservation from which said site is segregated, and on the west by a tract of land belonging to the Treasury Department of the United States and by the Military Reservation of San Juan, Porto Rico. Said site of land is described by metes and bounds as follows: Beginning at point number eightythree (83) on the western boundary line of the San Geronimo Naval Reservation, which point is the same as the point number eightythree (83) shown on the Military Chart of the Military Reserva-

tion of San Juan, Porto Rico; thence north twenty-  
53 three degrees twentynine minutes east (N.  $23^{\circ}$ - $39'$   
E.) three hundred ninetyseven (397) feet, more or  
less, to the sea to a point number eightynine (89) at the  
line of lower low water; thence easterly along the reef  
line of lower low water to point number ninety (90), the  
most easterly point on the rocks immediately in front of  
the old Fort San Geronimo; thence south fiftytwo degrees  
fiftyfour minutes west (S.  $52^{\circ}$ - $54'$  W.) six hundred ten  
(610) feet, more or less, to the point number ninetyfour  
(94) in the Laguna; thence north sixty degrees fortyfive  
minutes west (N.  $60^{\circ}$ - $45'$  W.) six hundred seventy (670)  
feet, more or less, to the point number eightysix (86) at  
the corner of the wall of the old pulverin; thence north  
sixty degrees forty-five minutes west (N.  $60^{\circ}$ - $45'$  W.) three

hundred fifty (350) feet to the point number eightyfive (85) on the western boundary line of the San Geronimo Naval Reservation; thence north twentythree degrees twentynine minutes east (N.  $23^{\circ}$ -29' E.) three hundred seventytwo (372) feet along said boundary line to point number eightythree (83) the point of beginning.

The lease of the above-described site of land in the San Geronimo Naval Reservation is made in consideration of the transfer, by the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), and his wife, Stella May Baker, to the United States of America, represented by the Secretary of the Navy, of a tract of land and easements for a distant-control radio station in Porto Rico, as described in the deed number twenty-eight executed on the seventh day of June, nineteen hundred and twenty, at San Juan, Porto Rico, before the Notary Don Eduardo Acuña Aybar; and in further consideration of the payment this date to the United States of America of the sum of one dollar (\$1.00) by the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired); and in recognition of services rendered by him in the war against the German Empire and in other wars; and in recognition of valuable services rendered by him in May, nineteen hundred and twenty, while not on active duty, which services aided materially in saving the U. S. Army Transport Northern Pacific then stranded in a dangerous position on a reef off the Island of Porto Rico.

In accordance with the desire of the Party of the First Part this lease is granted in lieu of the Complete transfer of title provided for in previous agreements hereinbefore mentioned, and is accepted by the Party of the Second Part in complete and entire satisfaction of all such previous agreements. It is also mutually understood and agreed that this lease is not revocable except by mutual agreement of both Parties; but that the Navy Department shall retain title to said site of land and, in accordance with the provisions of the Act of Congress authorizing the grant of this lease, it is mutually understood and agreed that the Navy Department shall have, in time of war or national emergency, if necessary, free and unlimited use, without cost, of the site of land herein leased.



The improvements that the Party of the Second Part guarantees to make in and upon said leased site of land include: the construction of a two-story concrete residence on the site of the old Fort San Geronimo of a size suitable for a home for his family, which consists of his wife and six children; the construction of a one-story concrete house for garage and servant quarters; the filling of the tide-water section of the Laguna within the site to a level of at least two feet above high water and the construction of a boat-house thereon; the filling of all the low marshy land which comprises a large part of the site.

54 Both Parties have read and are well acquainted with all the terms and conditions of this lease, and accept same in the form in which it reads, as same is in accordance with what they have covenanted.

Thus it is stated before Pickens Neagle and De Witt Talmage Baker acting as witnesses, of age, personally known to me, who are present in this act and who state that their residence is at Washington, D. C.

This Document, having been read by the authorizing Parties and Witnesses, is ratified by the Parties and signed before me by all, to which I, the Notary, hereby certify.

THE UNITED STATES OF AMERICA,  
By THEODORE ROOSEVELT,

*As Acting Secretary of the Navy,  
Representing the United States of America.*

VIRGIL BAKER,  
*Lieutenant-Commander, U. S. Navy (Retired).*

PICKENS NEAGLE,  
*Acting Solicitor, as to Theodore Roosevelt,  
Acting Secretary of the Navy.*

J. G.

Witness:

DEWITT TALMAGE BAKER.

WM. B. CROWELL, [SEAL.]  
*Notary-Public.*

(My commission expires March —, 1923.)

Amended Answer of J. Raymond McCarl, Comptroller  
General of the United States.

Filed December 17, 1926.

\* \* \* \* \*

The defendant, J. Raymond McCarl, Comptroller General of the United States, by leave of Court duly obtained for amendment to his return to the rule and amendment to his answer to the bill of complaint, says:

1. Further answering paragraph 5 of the bill of complaint, this defendant avers that the equity proceeding pending in the District Court for the District of Porto Rico against Virgil Baker and Stella May Baker, his wife, was submitted to said court, argued by counsel and by an opinion filed November 2, 1926, a copy of which is attached hereto as Exhibit "E," the said District Court held that the 999-year lease of July 15, 1921, had been obtained  
55 by this plaintiff through deceit and fraud on the United States; that said lease was unauthorized by law; that it was without adequate consideration to the United States; and directed the entering of a decree cancelling the so-called lease. In concluding the opinion the Court said:

"Notwithstanding the great length of this opinion, we observe that we have said nothing regarding the evidence that shows that the defendant, when he entered as a volunteer in the Army during the Spanish-American War, or when soliciting admission into the Naval Academy, reported falsely as to his age; that he solicited and obtained, without any cost on his part, certificates from the Registrar of property concerning the lands at Loiza, when he should have paid for them as any other private citizen, presenting himself in the Registry in such a manner as to give the impression that he was acting in his official capacity and for the benefit of the Government; that in a similar manner he obtained also for his service in connection with the San Geronimo lands the aid of prisoners in the Insular penitentiary, and of the trucks of the National Guard of Porto Rico; that he received at the same time two salaries from different de-

partments of the same Government, and that although living at San Geronimo, he claimed rent whenever called to active service. \* \* \*

2. Further answering this defendant says that because of the deceit and fraud found by the District Court for the District of Porto Rico in its aforesaid opinion filed November 2, 1926, to have been practiced by the plaintiff on the United States in obtaining the aforesaid so-called 999-year lease of June 15, 1921, and in claiming rental allowance of \$1,383.33 when he is in fact occupied public quarters in Fort San Geronimo, and in claiming salary of \$6,357.88 as Civilian Inspector of Hulls, Department of Commerce, when he was on active duty as an officer of the Navy, there is no equity in the bill of complaint.

J. RAYMOND McCARL,  
*Comptroller General of the United States, Defendant.*

PEYTON GORDON,  
*United States Attorney;*

LEO A. ROVER,  
*Asst. United States Attorney;*

O. R. McGUIRE,  
*Attorneys for Defendants.*

56 In the District Court of the United States for Porto Rico.

Equity. No. 1300.

UNITED STATES OF AMERICA, Complainant; THE PEOPLE OF  
PORTO RICO, Intervener,

VS.

VIRGIL BAKER and STELLA MAY BAKER, Defendants.

John L. Gay, Esq., United States Attorney, and John A. Smith, Major, United States Army, Attorneys for the Complainant.

J. A. Beverley, Esq., Assistant Attorney General of Porto Rico, Attorney for the Intervener.

O. B. Frazer, Esq., Attorney for the Defendants.



*Opinion.*

DEL TORO, J.:

This is a suit in equity brought by the United States of America against Virgil Baker and his wife, Stella May Baker, praying for the cancellation of a so-called contract of lease for a term of 999 years entered into by the parties on July 15, 1921. The Government of Porto Rico filed a Bill as Intervener.

After the complaint had been filed the defendants raised several questions on demurrer which were disposed of by an order and an opinion of November 20, 1925. The issue being duly joined, the trial was begun on May 10, 1926, and ended on June 19, 1926. The parties were given ample opportunity to file briefs and the case was finally submitted at the end of the month of August, 1926.

I have read for the second time and studied carefully the pleadings, the evidence and the briefs, and the opinion  
57      ion that I formed at the close of the trial has become fixed and clarified in such a manner in my mind and in my conscience that I can see only one solution compatible with justice, that is to sustain the Bill of Complaint.

In my judgment the pleadings and the evidence show that the defendant, a retired officer of the United States Navy, came to the City of San Juan about the year 1915 under appointment by the Department of Commerce as Local Inspector of Hulls. While holding that position shortly before the United States became involved in the Great War, he sent a cablegram to the Navy Department, which read:

“I request to be placed on war slate for mobilization for duty in charge of Naval Radio Station, San Juan, Porto Rico, and for such other duty as the Department may require. \* \* \*

After a preliminary reply, on April 5, 1917, the Department ordered the defendant to report “immediately for duty in charge of the Radio Station, San Juan, Porto Rico.” He did so, and at the same time continued holding the position of Local Inspector of Hulls.

Upon taking charge of the station, which was and is situated on a tract of land of several acres belonging to the

military reservation and transferred temporarily for that purpose by the War Department to the Navy Department, the defendant, with his family, moved into a house situated within the said station grounds.

On May 11, 1917, the defendant sent the following radiogram to the Navy Department:

“Request that War Department be requested to turn over to this radio station the quarters at San Geronimo, Post of San Juan, for use of additional personnel and marines requested for this radio station. These quarters are close to radio station and are vacant and are necessary for additional personnel.”

This message bore the following note: “Govt. Rush Radio via Haiti.”

58        On the following day, May 12th, the Secretary of the Navy made the corresponding request and on June 1st the Secretary of War answered:

“Referring to your letter of May 12, 1917 \* \* \* requesting that the quarters at San Geronimo be made available for the quartering of the proposed Marine guard for the Radio Station at San Juan, I have the honor to inform you that these quarters will be placed at the disposal of the Navy Department, upon the understanding that in the future the use of these quarters revert to the War Department if found necessary.”

The marines arrived, but were not quartered at San Geronimo. They raised tents on the station grounds and lived there. No additional personnel was lodged in the fort. It was the defendant himself who, in the same month of June, 1917, by his own order, which he did not communicate to Washington, moved with his family to San Geronimo, and thus was consummated the first step toward the so-called contract of lease sought to be annulled by this suit and by virtue of which the defendant obtained for himself, his heirs and assigns the possession and enjoyment, at a cost to him of less than five hundred dollars, for nearly ten centuries, of a tract of land of several acres situated within the limits of the City of San Juan, the capital of Porto Rico, and valued by experts worthy of entire credit at more than a quarter of a million dollars.

Considering the price which has been paid for lands situated in the same zone of Puerta de Tierra; the value of lots in the old city of San Juan; that, with very few exceptions, there is only free space on the Island in the federal reservations or in the properties of the Insular Government; the admirable situation of the lands granted to the defendant fronting on the sea and the lagoon and with direct outlet within the reservation itself to the highway now called Ponce de Leon Avenue and near five bridges linking the Islet of San Juan with Santurce, which belongs to  
59 the same municipality; and considering besides the historical value of the fort of San Geronimo included within the concession (Historia Geografica, Civil y Natural de la Isla de San Juan Bautista de Puerto Rico, por Fray Inigo Abbad y Lasierra, anotada y continuada por Jose Julian Acosta y Calbo, Puerto Rico, 1866, paginas 186 a 210), and the conditions of the contract of July 15, 1921, the value of said contract could not be fixed at less than half a million dollars. The condition for its use by the Navy Department in war times or national emergency, *if necessary*, being a matter of a government of the traditions of the American Government, and taking into consideration the vast properties it has in the Island, does not amount to much. After all, it is more than neutralized by the extraordinary privilege, of an immediate value, of the non-payment of taxes which permits, if taken at the present rate of taxes on real property, the saving of more than twenty times the total value of the lands during the life of the contract.

Regarding the exact area of the land granted to the defendant, witness Robert P. Murden, for the complainant, fixed it, calculated by the planimeter, at 19.33 acres, of which 5.27 acres were on the Laguna Bay; and witness Allen Hoar, for the defendant, calculated it at 18.142 acres, of which 5.864 acres are on the Laguna Bay. Be this as it may, omitting the section on the Laguna Bay, to which we shall refer when we speak of the intervention of the people of Porto Rico, this suit involves a tract of solid land of more than fifty thousand square meters.

Perhaps it may seem too severe to characterize as fraudulent this first act, which, if standing alone, might be susceptible of another interpretation. When one begins to



study this matter the presumption of honesty which accompanies human transactions and is in fact very strong in this case because of the prestige of the persons participating therein, conscience repels the idea of a fraud. But when the chancellor has gone deeply into it and every document and word has been studied and analyzed, such a conviction takes possession of his conscience regarding at least the acts of the defendant that it is impossible to reach another conclusion. What is then surprising is how the defendant could arrive at his objective without disclosing his real intention. The key to that can be seen in this same first act. War had begun. Work and worries had become intensified in Washington. Porto Rico is a long distance away. The defendant was in fact the only head of the activities of the Navy in this island. He had to and did inspire entire confidence. He sent "rush" messages by radio and asked that "vacant quarters that are close to the Station be requested for use of additional personnel and marines requested for the station that have been placed under his control." What other impression could such a message produce than that of a faithful servant who foresaw everything and who had the capability and the energy of adopting and suggesting the adequate means? What other attitude could it be expected that Washington would assume than to agree to the request for the benefit of the service? And yet that logical deduction was false. The real reason for the action of the defendant, to secure for his residence the house in the fort, did not arise out of the radio, and remained hidden in his mind; but it was achieved.

After he had moved with his family to San Geronimo, "one of the quaintest, one of the most unique residences imaginable," as ex-Judge Hamilton said during the trial, what did the defendant do? Day after day he had the opportunity to appreciate the splendid location, the advantages and the material value of the reservation. In the testimony of Judge Hamilton are found the following words: "The site itself is not very available. The site, the place itself, is the choicest place in San Juan. It is certainly the most unique. I lived there two years and we certainly would not have moved unless they had put us off."

It is risky to inquire into the consciences of human beings, but when their subsequent acts make manifest their hidden thoughts, the chancellor can infer and speak firmly of their previous intentions. And the later acts of the defendant lead to the conclusion that the idea not to leave San Geronimo, but to remain there somehow, arose in his mind, undoubtedly not in a definite form then, but it did arise, previous to September 30, 1918. It should not be forgotten that the real position of the defendant in the Navy was that of a retired officer and that his intention, as expressed in writing by himself, was to reside permanently in this Island.

On the date mentioned, acting for himself and without consulting Washington, he addressed a letter to the Commanding General of the District of Porto Rico, containing the following paragraph:

“1. In order to provide for the present and future needs of the Navy at this place your approval is requested for the transfer from the War Department to the Navy Department of that section of the Army reservation here known as San Geronimo \* \* \* ”

The Commanding General replied on October 8, 1918, that “there is no objection from the military viewpoint to the transfer desired,” and on October 9th, 1918, the defendant, enclosing a copy of that letter, wrote to the Secretary of the Navy as follows:

“1. *It is strongly recommended* that the approval of the War Department of the transfer to the Navy of the section of the military reservation \* \* \* *be obtained and that Congress be requested to pass the necessary legislation to make the transfer permanent.*”

A series of reasonings tending to show the advantages and the necessity of the transfer followed. (Italics, as all others found in the course of this opinion, are volunteered.)

Time passed and as the defendant received no answer, on November 16, 1918, he wrote to the Secretary of the Navy as follows:

“1. Information is requested as to what action has been taken on the recommendation contained in above reference

and whether or not the *permanent* transfer to the Navy Department of that section of the Army Reservation here will likely be accomplished.

“2. In case the recommendations in the above reference are approved it is recommended that the *final action accomplishing the transfer be expedited as much as possible, as I understand that local interests are planning to get control of the section described, since the Army has no further use for it.*”

There follows a series of arguments stated in an energetic and persuasive manner in favor of the transfer.

After hearing the opinions of the Director of Naval Communications and of the Bureau of Steam Engineering, the Department refused to approve the transfer and communicated its decision to the defendant on November 25, 1918. Therefore, the plans of the defendant were frustrated for the moment. His letters did not produce immediate effect as did his radiogram of May 11, 1917. But the defendant persisted. He allowed a few months to elapse and on February 28, 1919, again wrote to the Department. He did not address his petition, as formerly, to the Secretary of the Navy, but to the Chief of Naval Operations. He presented the case again in a convincing manner, beginning thus:

“1. *Owing to the fact that the Navy may be deprived at any time of the use of the quarters and the section described, the inclosed papers, inclosure (d) are returned urging careful reconsideration.*”

and ending:

“13. For the reasons stated, and in order to provide for probable future needs of the Navy in San Juan, *it is urgently requested that definite arrangements be made as soon as possible for the formal lease or permanent transfer of San Geronimo quarters and reservation to the Navy.* In order to expedite action by the War Department I am forwarding herewith the original endorsement, enclosure (c) of approval by the Commanding General of the Army and also by the Commanding Officer of the Coast Artillery here.”

The defendant not only wrote the official letter referred to on February 28, 1919, but also sent another letter to Com-



mander Woodworth. In that letter he begged leave to *urge upon the proper officers the urgent necessity of the Navy Department getting complete control of San Geronimo Reservation*, and from that letter the following paragraphs are quoted:

*“I know of nothing that would more completely upset our work and organization, or that would add so many difficulties to the general administration of this station as would the giving up of San Geromino in case the Army should suddenly decide that they might need it.”*

*“For your confidential information, while the General would be glad to have us take it now, there is great danger of the Army wanting it when the Porto Rico Regiment return from Panama, which will be in a few weeks, and if the Navy loses the opportunity of obtaining this most desirable section now, we will probably never have the War Department consent again to our taking it.”*

*“I know that Porto Rico is a small place and probably does not enter very heartily into the plans of the Department just now, but I am most deeply concerned with the general efficiency of this District, and I know of nothing that would be more disastrous to that than having to give up the site and buildings at San Geronimo.”*

*“I would be willing to guarantee that, before three years have passed, the undisputed possession of San Geronimo would be worth fifty thousand dollars to the Navy, and I certainly regard this as one instance where the Department should be guided, to some extent at least, by the opinion of the officer on the ground. Conditions would be made such at the station by our having to give up San Geronimo that I would not care to remain on duty here and be responsible for the contentment and efficiency of this station.”*

*“So what I wanted to ask you or Captain Todd to do is to follow up this recommendation through Steam Engineering and Operations and the Secretary’s office, and see that it gets promptly to and through the War Department before the General here has a chance to change his mind.”*

*“In my opinion formal lease on the property would be the best thing to work for just now with a view to having a permanent transfer made when it can properly be brought before Congress.”*

64 And the defendant did more. In the following week on March 6, 1919, he sent to the Department a lengthy report on the following subject: "United States Naval Base in Porto Rico," and in it he included the following paragraphs:

"16. The City of San Juan, with its 70,000 population, five regular steamship lines, two cables, freight-handling facilities, two large foundries, and three well equipped repair shops, and with its general commercial equipment, is only thirty miles distant by land or sea routes and would greatly facilitate the construction and operation of a base on the eastern coast \* \* \*

"17. In this connection, a small section of the Military Reservation of San Juan *is available now for transfer to the Navy and can be had for the asking. The indications are that in a few months it will not be so available and its early acquisition for Naval purposes is strongly recommended.* This section includes large level space of several acres well-suited to the requirements of air-craft. Another part includes several hundred yards of *docking space suitable for submarines, submarine-chasers, tugs and other small craft.* This section is directly on the railroad leading to Fajardo, is centrally located with reference to the business section, and would furnish an excellent site for such storehouses, quarters, or offices as might become necessary in San Juan."

And that is not all. The defendant went personally to Washington, leaving Porto Rico, according to his own testimony, on March 8th or 9th, 1919. He went to the Office of Naval Communications, had a conference with Commander Woodworth, and on March 17, 1919, the Secretary of the Navy addressed a letter to the Secretary of War requesting his approval of the transfer. The Secretary of War acceded and on the following day a document was signed which reads literally as follows:

"Whereas the Navy Department is desirous of having control in the Government's interest of a tract of land at San Juan, Porto Rico, for the operation of a radio telegraph station and for other Naval purposes, and

"Whereas the tract known as San Geronimo within the San Juan Military Reservation is not now required and in

all foreseeable probability will not be required for Military uses by the War Department, said tract of San Geronimo is, having the public interests in view, hereby leased to  
65 the Navy Department for a period of ninety-nine years for such use and improvement in such manner as may be deemed proper by the Secretary of the Navy; provided that the War Department shall at all times have such right of way as may be necessary in the discretion of the Secretary of War to admit of free passage and communication at all times with any adjacent part of the San Juan Military Reservation."

Thus was consummated in Washington the second step toward the so-called contract of lease of July 15, 1921, for 999 years. On what did the Departments act? There is no doubt that they acted on the representations of the defendant. Were these representations true or false? In our opinion they were false, as we shall see.

The defendant began by addressing his petition to the Secretary of the Navy. His recommendation reached Washington, went through the regular course and the bureaus that had knowledge and interest were heard and their opinions were unfavorable, so the approval of the transfer was denied. The Navy Department had voluntarily abandoned lands fronting on San Juan Bay. It has its radio station installed with sufficient space and moreover owned the reservation of San Geronimo for such use as had been allowed. In fact it needed nothing more.

Notwithstanding these facts and the real expression of the thought and policy of the Navy Department, the defendant persisted. He did not address himself directly, as before, to the Secretary. He sent his official communication to the Chief of Naval Operations and at the same time his semi-official letter to Commander Woodworth, and the following week he sent his general report. And in case all that did not produce the desired result, due to the circumstances to be seen later, he went personally to Washington, visited Commander Woodworth and succeeded in convincing him to such an extent that without seeing as before the written reports of the bureaus, the signature of the Secretary of the Navy was secured requesting the transfer and the Secretary of War agreed.



66       The conduct of Commander Woodworth and of the Secretary of the Navy explains itself. The letters of the defendant were convincing, and still more convincing must have been his personal presence. The presence of the defendant in the Department must have produced the impression that he was an officer extremely zealous of his duty, who insisted, wrote, reasoned, struggled and even travelled in order to obtain something for the benefit of the Navy and of the district under his direction. Why wait to investigate when the officer on the ground firmly requests the Department to be guided by his opinion and says that he knows nothing that would more completely upset his official work and organization, or that would add so many difficulties to the general administration of the radio station, or that would be more disastrous to the service than to give up the site and buildings at San Geronimo \* \* \*?

Yet the truth, the plain truth, as revealed by the evidence, was that the grounds on which the radio station was and is situated were then and are still sufficient, and that San Geronimo was only occupied as a residence by the defendant. All the difficulty, all the calamity that could supervene if the War Department needed San Geronimo would have been that the defendant would have had to leave the fort and live in a private house, or in the small house which he occupied at the beginning in the same station, or in a tent.

Furthermore, in a letter written by the Secretary of the Navy to the Secretary of War on March 17, 1919, as a consequence of the written and verbal representations of the defendant, it was expressly stated that the consent of the U. S. Commanding General in Porto Rico was obtained, and that letter was accompanied by the said consent and in the same document of transfer it is said that San Geronimo "is not now and in all foreseeable probability will not be required for Military uses by the War Department."

67       And the fact is that on March 7, 1919, before the defendant left for Washington, in reply to a letter from him the Commanding General had requested that the property be delivered on or about March 31, 1919.

During the trial the defendant testified that he did not receive the reply and the request of the Commanding Gen-

eral before leaving for Washington, and that on the contrary he was under the impression, by virtue of conversations had with him, that he had not changed his mind. The Commanding General died before the date of the trial. The Court does not believe the testimony of the defendant, for it is contrary to the actual facts. His letters show that he feared and expected such a change of mind on the part of the Commanding General upon the return of the troops from Panama, and the troops returned before the defendant left, which he did by his own admission, on March 8th or 9th, for Washington, or at least one or two days after the letter was written, both officers being residents of this city of San Juan.

If anything explains the hurried trip of the defendant to Washington, it is precisely the change of attitude on the part of the Commanding General, to which change the defendant gave the extraordinary importance revealed by his letter to Commander Woodworth.

These are not the only false representations of the defendant to secure the transfer of March 18, 1919. Others can be noted by comparing his letters with the facts, but these are enough for the purposes of this opinion.

What did the defendant do after he had induced the Navy Department to secure greater control of the reservation? He tried to clarify the situation by leaving unoccupied and without official use the house occupied by him in the  
68 fort and the adjacent lands. In order to induce as he did the Navy to decide to request the transfer, he praised the admirable conditions of San Geronimo and urged the absolutely and immediate necessity of the Department's getting control of it. The tactics followed thereafter were different. Before he disclosed his intention he sought to have quarters built at a certain place on the reservation indicated by him for the District Communication Superintendent, thus leaving free the house in the fort which he described as in a ruinous condition, and the adjacent lands.

To that end, on May 6, 1919, he wrote a letter to the Director of Naval Communications containing the following paragraphs:

"1. Allotments for the *immediate construction of Officers' quarters urgently needed* for the Distant Control Station are requested as follows:

|                                                                                        |                   |
|----------------------------------------------------------------------------------------|-------------------|
| "One set of quarters for District Communication Superintendent .....                   | \$7,000.00        |
| "One smaller set of quarters for District Medical Officer or District Pay Officer..... | 5,500.00          |
| Total .....                                                                            | <hr/> \$12,500.00 |

"2. The two sets of quarters requested are *urgently needed*.

"3. The District Communication Superintendent has been occupying as quarters an old wooden Spanish building which belonged to the Army. This building is old, *badly decayed, leaky and unsanitary*, and is in such poor condition as not to justify repairing it, *and it should be abandoned as a residence.*"

On May 13, 1919 the Director of Naval Communications endorsed the letter to the Bureau of Yards and Docks, via Bureau of Steam Engineering, thus: "Forwarded, recommending approval." The endorsement is signed: "E. B. Woodworth, By Direction."

On May 20, 1919, the Bureau of Steam Engineering reported adversely. The last two paragraphs of the report are as follows:

69 "3. The Bureau understands that there is located on the San Geronimo Reservation, recently turned over to the Navy by the War Department, a cottage which is suitable for the use of the District Communication Superintendent.

"4. It would appear, therefore, that by utilizing the cottage of the San Geronimo Reservation and remodelling the cottage now used as a barracks sufficient quarters could be made available for all officers and enlisted personnel without the necessity of constructing additional buildings."

On the following day the Director of Naval Communications, E. B. Woodworth, by direction, sent the said report to the defendant "for comment and return." And the defendant, on May 30, 1919, accordingly made his report. In



the communication which it contains are the following paragraphs:

“Referring to par. 2 of reference (b) and to par. 3 of reference (a), there is an old frame building, built in Spanish times, on the San Geronimo Reservation, and I am at present occupying the habitable part of it as quarters. The condition of that building is such that it will soon have to be abandoned or rebuilt. The building which is built partly on top of an old wall is extremely unsanitary and rat-infested. The metal roof is rusted through in places and leaks. The beams and floor planking have been completely eaten through in places by tropical wood ants or have rotted until they are giving way in places. The walls on which the house rests were badly shaken by the earthquake a few months ago, and part of the structure, which is directly over the sea, has caved in. To reconstruct this building and its foundation walls would cost not less than \$10,000.00.

“Considerable has already been spent on repairs on this building during the past two years without permanent benefit, and it would not be economy to attempt to repair the building and it should be abandoned as a residence as soon as additional Officers’ quarters can be provided. I have spent considerable from my personal funds to make the building temporarily habitable and have continued to occupy the building owing to the urgent necessity of my living as close as possible to the Radio Station.

“As there is no suitable space remaining on the Radio Station proper, it is proposed to erect these quarters on the high ground along the west shore of Laguna Bay as shown by the plots indicated on inclosure. As the prevailing winds are northeast, this is the coolest and cleanest site available and is free from flies and mosquitoes. This site is the part of the San Geronimo Reservation nearest the Radio Station and is conveniently located near to the main thoroughfare (Military Road) and near to the trolley  
70 line. Water, gas, electricity and telephone lines are immediately available. The Laguna Bay is a clean, deep bay on which the quarters would front. There is ample room for two additional sets of quarters along the same shore in case it should be decided in the future to construct more quarters.”

On June 10, 1919, the Director of Naval Communications, E. B. Woodworth, by direction, returned the matter to the Bureau of Steam Engineering, renewing his previous recommendation.

On June 30, 1919, the defendant seeing that he received no reply, used the radio and requested to be informed of the state in which this matter was, insisting that

*“these quarters are urgently needed owing to decayed, leaky, and unsanitary condition of quarters now occupied by District Communication Superintendent and which must soon be abandoned \* \* \*”*

On July 2, 1919, the Bureau of Steam Engineering again made an unfavorable report, but the defendant, relying on the approval of the Director of Naval Communications, and noticing that time was passing, did not wait longer, and at last, on July 10, 1919, his hidden purpose, the real object of his activities, was disclosed in a written document addressed to the Secretary of the Navy, as follows:

“1. Your approval is respectfully requested of the inclosed lease on a small section of the Naval Reservation at San Juan, Porto Rico, which section, in all probability, will never be required for Naval purposes, and of which I desire to have control in order to improve and to construct thereon a residence for my personal use.

“2. The greater part of the section of ground desired is low and swampy and is a breeding place for mosquitoes. After a heavy rain a large part of the section is flooded and remains so for several days. It would cost about \$3,000.00 for grading and filling and drainage in order to put that section in good sanitary condition. This I would guarantee to do to the satisfaction of the Department.

“3. I would also guarantee to erect thereon a permanent concrete residence of approved type of construction and costing not less than \$10,000. I would reside in this residence with my family, and during such residence, I would waive all claim to other quarters or to commutation of quarters.

71 “4. This section is the part of the Naval Reservation most remote from the Naval Radio Station and from San Juan, and is the least useful from a Naval point

of view, and I know of no Naval purpose for which it could be used to advantage, even after the considerable cost of putting it in good sanitary condition.

“5. Authority for the construction of two sets of Government quarters for Officers has already been requested and has been approved by the Director of Naval Communications. This lease would not interfere with the site selected for these two sets of quarters, which site requires but little grading and where there is more than ample space for five sets of Government quarters in case they should be necessary in the future. The last mentioned site is nearest the main highway, the trolley line, and the Naval Radio Station.

“6. The Government quarters whose construction has been approved will not be enough to provide quarters for all the Officers stationed at this District Center Station. So the residence which I propose to construct would provide an additional set of quarters, at least while I am on active duty here.

“7. Whether retained on active duty or not I intend to remain in Porto Rico, and shall always consider myself available for call to active duty in case my services are needed.

“8. It might possibly be of some advantage to the Service to have living near the Naval Reservation a Retired Officer who would be at all times available for active duty if needed. Such was the case on our entry into the war with Germany, at which time I was the only Commissioned Line Officer of the Navy in Porto Rico. I was immediately ordered to active duty and was given charge of all activities of the Navy on shore in Porto Rico. These included Naval Communication, Cable Censorship, Naval Intelligence, Routing of Vessels, and Mail Censorship.

“9. In considering my request for this lease I request that consideration be given also to the fact that I served in the Volunteer Army during the Spanish-American and Filipino Wars and saw active service in the Philippines. I was honorably discharged in November 1899, by reason of the muster out of the Regiment.”

On July 11th, the Governor of the Virgin Islands endorsed the said petition as follows:



“1. Forwarded, approved.

“2. In view of the small probability of the need of the entire reservation for Naval purposes, and in view of the evident advantage to the Service which would result from the granting of this lease, I recommend that the request of Lieutenant-Commander Baker be granted.”

Some time passed and how the defendant insisted  
72 that the Navy Department should obtain an absolute title, as revealed in the first paragraph of his letter of October 8, 1918, may be judged from his letter of August 15, 1919, addressed to the Director of Naval Communications, the three paragraphs of which read as follows:

“1. The above-mentioned Reservation was leased March 18, 1919, by the War Department to the Navy Department. As shown by reference (b) the transfer was made by lease at that time, pending the complete transfer by the President. Action by the President was not practicable at that time, owing to his absence from Washington.

“2. As it was intended at that time that the complete transfer of the Reservation to the Navy Department should be made as soon as practicable, it is recommended that the Secretary of War now be requested to make the complete formal transfer of the title to this land to the Navy Department.

“3. Authority for such transfer is given by reference (c).”

Reference (c) was Paragraph 3, Page 2, of Naval Appropriation Bill which had been passed the month before and authorized the transfer of the nature of the one recommended by the defendant.

The matter seemed to come to a standstill, the defendant went again to Washington and while there on August 25, 1919, the Director of Naval Communications endorsed his petition as follows:

“1. Forwarded. First endorsement concurred in, provided the tract of land in question will not be required for the establishment of a distant control station.”

On the following day, August 26, 1919, the Bureau of Steam Engineering said:

“1. Forwarded.

“2. The tract of land referred to will not be required in connection with the establishment of a distant control station at San Juan or for other purposes in connection with this radio station.

“3. It is, therefore, recommended that, if there are no legal obstacles to such action, Lieutenant-Commander Baker  
73 be permitted to erect on the land in question one house for his personal use, or for that of his family, and that it be stipulated that the lease shall not be transferred to any others than his legal heirs.”

And on the same day, August 26, 1919, was consummated in Washington the third step toward the obtention of the so-called contract of lease for 999 years of July 15, 1921. The signed document reads as follows:

“Whereas, Lieutenant-Commander Virgil Baker, U. S. Navy (retired), is desirous of having control of a small site of land on the San Geronimo Naval Reservation at San Juan, Porto Rico, for the purpose of erecting a residence thereon, for improving the sanitary conditions of said site of land, and for making other improvements thereon, all of which will be of benefit to the entire Naval Reservation, and

“Whereas, the below-described tract of land on the San Geronimo Naval Reservation is not now required and in all foreseeable probability will never be required for Government use; and having the public interests in view, and in consideration of the sanitary and other improvements which the said Lieutenant-Commander Virgil Baker proposes to make, and in consideration of the payment by him of a total rental of one dollar (\$1.00), and in recognition of services rendered by him in the war with the German Empire and in other wars and expeditions, said site of land, with right of way thereto, is hereby leased in accordance with law, to the said Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), and his heirs for a period of five (5) years from the date hereof for the purpose above-mentioned and improvement in such manner as he may deem proper. It is a condition of this lease that it is non-transferable to others than the legal heirs of the lessee, and that, in time

of war only, the Navy Department shall have, without cost, full and free use of said site with all improvements thereon.

“The aforesaid site of land is described and bounded as follows: Beginning at the point No. 83 on the western boundary line of the San Geronimo Naval Reservation and extending along and outside the ocean shore line and around and outside of the walls and rocks of the old fort San Geronimo to its outer southwest corner on the Laguna; thence from said outer southwest corner in a straight line No.  $71^{\circ} 46'$  W. and outside of the old wall to the point No. 88 where said line intersects the old wall; thence ninety (90) feet S.  $74^{\circ} 40'$  W. along the old wall and moat to the angle at point No. 87; thence ninety-nine (99) feet S.  $7^{\circ} 09'$  W. along the old wall and moat to the corner of the wall at point No. 86; thence along the old moat in a straight line N.  $60^{\circ} 45'$  W. to a point No. 85 on the western boundary line of the San Geronimo Naval Reservation; thence N.  $23^{\circ} 29'$  E. along said boundary line to point No. 83, the place of beginning.

74 “This lease is made pending complete transfer by Congress of title to said site to the lessee, which transfer meets the approval of the Navy Department.

“Signed, sealed and delivered at Washington, D. C., this 26th day of August, A. D., 1919.”

What were the false representations of the defendant in relation to this third act?

We have seen how he describes the house by letter and by radio as *badly decayed, leaky and unsanitary and in such poor condition as not to justify repairing it and which must be abandoned.*

Was that the truth? By no means. The house was not, nor is it in fact, a palace or even a luxurious residence, but it had been occupied as a residence by officers of the Army and by Federal Judges, and since 1917 it has been the continuous residence of the defendant and his family. Its present condition, seven years after it was urgently requested that other quarters be constructed because of its ruinous condition can be seen from one of the photographs introduced in evidence by the defendant himself.



Judge Hamilton testified fully about the condition of the house in question and said that he had spent a good amount of money in repairing it. The Navy Department itself, on the recommendations of the defendant, as he wrote to the Commanding General of the District of Porto Rico in his letter of May 6, 1919, made "considerable expenditures for repair of the house, construction of a concrete boat dock, etc." And the defendant himself, according to his letter written on the same day that he addressed a communication to Washington requesting the construction of the quarters based on the ruinous condition of the house, said that he had spent "considerable personal funds *making the place habitable.*"

When the defendant asked for the personal lease on July 10, 1919, he did not say that he was going to live in  
75 the house, but said it was for constructing his residence, thus carrying to the limit with this statement the idea of the uselessness of the existing house, and nevertheless, we repeat, the evidence shows that the house is still standing and that the defendant has not had to abandon it or make other repairs than those usually made by the owners of houses of that class.

The same tactics were followed by the defendant regarding the lands. It was described as *a small section desired to construct a residence for the personal use of the defendant, the greater part of which was low and swampy and a breeding place for mosquitoes.*

Was that the real truth? By no means. The word *small* has a relative meaning. The whole island of Porto Rico is said to be small, and in fact it is as compared with the Continent. But to designate as small the section of the Reservation set aside by the defendant himself and asked for in order to construct thereon a residence for his personal use, is a clear and manifest false representation tending, as the others, to produce, as it did, in the minds of the officers in Washington who finally had to decide the matter, the impression so exactly described by Secretary Daniels in his deposition which we shall analyze later. The truth is that it is shown by the plan of San Juan, of the islet which is the seat of the federal offices and of the insular and municipal governments, where the docks and the large buildings are situated, the real old residential, commercial and

industrial city, that only a multi-millionaire could have purchased that so-called small section for his private residence.

And it was another false representation, according to the result of the evidence, tending equally to produce, as it did, in Washington, the impression of something of negligible value, to say that *the greater part of the ground desired is low and swampy and is a breeding place for mosquitoes*. The preponderance of the documentary and oral evidence shows that there was no swampy land on the part of the reservation set apart by the defendant for himself. On the contrary, it was the best part of the reservation and actually the only habitable part, with the exception of the strip of land between the southern boundary of what was asked for by the defendant and the public road. The rest, from the road to the canal, was what really contained the swampy land of the San Geronimo Reservation.

But let us continue to develop the events without exhausting the argument. At times during the long study made of this case and now when I try to put my thoughts in order, it has seemed to me that the best thing would be not to write an opinion but let the record speak for itself without comment, for I realize fully how difficult it is to say what the record shows and to bring out its interior contents.

Was the defendant satisfied with the lease secured? Was that all he wanted and set out to obtain? The evidence shows that it was not.

The defendant testified that the lease that he had solicited was not for five *years*, but for *ninety-nine years*, and in the same contract of lease of August 26, 1919, there is a paragraph which says:

“This lease is made pending complete transfer by Congress of title to said site to the lessee, which transfer meets the approval of the Navy Department.”

The defendant aspired, therefore, to an absolute conveyance. By the said false representations to the effect that he was asking for something of very little value, which he had to improve and in which he intended to build his residence and live permanently, at the service of the Navy in this far away Island of Porto Rico, he

succeeded in having stated in the document what we have just seen. His hope was in Congress, but how to obtain the transfer? On what basis? How could he ask Congress to act? We shall know immediately.

In January of 1918 Lieutenant McWhorter, United States Navy, arrived in Porto Rico. He had engaged before in preparing the preliminary plans for the Cayey Radio Station and his mission here was to construct the said Cayey Station.

He found that the work had been begun on Magazine Hill and it seemed to him that the site was not suitable. He conferred with the defendant, who was at the time District Communication Superintendent in San Juan, and as a result of the conference the matter was referred to the Navy Department by cable, with recommendation that construction stop on Magazine Hill, and that the Department endeavor to obtain another site on the same military reservation at Cayey, which was approved of. The War Department issued the required permit immediately by letter and the Cayey station was constructed at a cost exceeding eight hundred thousand dollars, without soliciting permanent transfer of the lands or even mentioning the necessity of appealing to Congress for it.

It is well to remember that at that time the radio station of the Navy Department at San Juan had been constructed several years before on grounds of the military reservation granted temporarily for that purpose by the War Department to the Navy Department and that no permanent transfer had ever been requested, nor had the intervention of Congress for it ever been spoken of.

According to the testimony of Lieutenant McWhorter "the subject of a remote control station for the control of Cayey and San Juan was in the original plans for the construction at Cayey. However, it was decided to construct the transmitting station first, leaving the distant control feature until later on, when it might be determined where was the best location."

At this stage a letter was written to Lieutenant McWhorter from the Navy Yard, New York, dated May 31, 1919, on the following subject: "Outline of radio work fiscal year of 1919 and 1920." Its third paragraph read: "The above includes for example, construction of new radio stations



and buildings, purchase of land, construction of distant control station, and new apparatus for shore stations.”

On May 17, 1919, Lieutenant McWhorter replied. The first paragraph of his answer reads:

“1. It is recommended that the sum of \$71,000.00 be included in the 1919-1920 appropriation for the purpose of establishing a distant control station for the control of this station and for the erection of quarters. This amount is divided as follows:

|                                                                                                                      |              |
|----------------------------------------------------------------------------------------------------------------------|--------------|
| Item 1. Purchase of land for distant control station .....                                                           | \$5,000.00   |
| “ 2. Buildings for distant control station, office, operators’ quarters, married quarters and Officers’ quarters.... | 35,000.00    |
| “ 3. Antenna and control wire system for distant control station .....                                               | 10,000.00    |
| “ 4. Quarters for Officer in Charge and Gunner at this station.....                                                  | 13,000.00    |
| “ 5. Enlarging present operators quarters at this station.....                                                       | 8,000.00     |
| <hr/>                                                                                                                |              |
| Total .....                                                                                                          | \$71,000.00” |

The answer was sent via District Communication Superintendent of Porto Rico, and the defendant added the following endorsement which points out the way toward his definite plan of making himself the owner of the lands of the government. It is as follows:

“1. Forwarded, approved.

79 “2. In lieu of making the expenditure of Item 1, it is recommended that, after the location for the site for the distant control station has been decided upon, an effort be made to exchange for the necessary site some of the land here under the control of the Navy, but which is not urgently needed for Naval purposes.”

In the communication sent by the Bureau of Steam Engineering to the Secretary of the Navy on July 14, 1919, submitting to him an outline of various projects, pertaining to the U. S. Naval Radio Stations, which it has under

consideration for accomplishment during the fiscal year 1920, appears the following:

“Establish distant control of the San — and El Cayey Radio Station- from a central point \$77,000.00.”

It recommended, therefore, more than the estimate of Lieutenant McWhorter (\$71,000.00), in which were included \$5,000.00 for “purchase of land for distant control station.” The recommendation was approved by the Acting Secretary of the Navy.

We know of the other steps taken by the defendant during these months and we know that he succeeded in obtaining on August 26, 1919, the first contract of lease which did not meet all of his purposes.

As soon as he returned to Porto Rico, in spite of the fact that in the plans of the Department a sufficient amount had been assigned for the purchase of lands, without the remotest suggestion from anyone, and there being no necessity for it, as it was a matter of a government of such immense resources as the United States of America, the defendant insisted on the idea expressed in his endorsement of May 20, 1919, and wrote a letter to the Director of Naval Communications dated at San Juan, P. R., September 3, 1919. It is as follows:

“1. In order to lessen the cost of and to facilitate and expedite the acquiring of a site in Porto Rico suitable in all respects for the location of a Receiving and Distant Control Station for the Radio Stations at San Juan and Cayey, Porto Rico, it is requested that the Department prepare a bill in substance as follows, and that Congress be requested to enact same immediately as a separate bill:

80      “ ‘That, for the purpose of acquiring a suitable site for, and for erecting and installing a receiving and distant-control radio station in Porto Rico, the Secretary of the Navy be and hereby is authorized to sell or exchange any property or land under Naval control in Porto Rico not otherwise required for Naval purposes.’

“2. Investigation indicates that the entire cost of purchasing a suitable site of six to eight acres for the Station and buildings, and for leasing such additional ground as may be needed for installing an underground receiving sys-

tem can be entirely covered by disposing of certain property in Porto Rico under Naval control but which property probably will never be required for other Naval purposes."

The unequivocal terms of this letter show how far the defendant had gone on his own account without authority, without necessity, without the service requiring it, guided only by his hidden purposes of securing the part of the reservation that he had in mind and how well he had everything planned when he sent the drafted bill to be submitted to Congress for its approval.

Five days later, or on September 15, 1919, by his own decision, without consulting the Department and without any special authority to do so, he appointed a "Board for Selection of Site for Receiving and Distant Control Radio Station in Porto Rico," composed in the detailed manner shown by the record.

On the following day, September 16, 1919, without referring to the appointment of the board, he addressed a long letter to the Bureau of Steam Engineering, via Director of Naval Communications, in which, adopting the same policy followed to induce the Department to solicit the permanent transfer of the San Geronimo Reservation, he set forth in commanding and persuasive language the necessity of constructing the distant control station and finished by saying:

81 "10. Preliminary investigation shows that a suitable site, seven miles from the coast, and hidden from enemy gun fire, can be obtained near Carolina, Porto Rico.

The site referred to has ideal conditions for installing the underground receiving system in that there is a river flowing almost due north, and on both sides of the river, exactly opposite each other, are two tributaries flowing at right angles to the river. Other conditions, such as sanitation, railway, highway, and telephone and telegraph communication with San Juan and about twenty miles from Cayey, and is twelve miles distant from the high range of hills in the southern part of the island.

"11. The site referred to is located on very valuable sugar land but inquiry of the owners of the land indicates that probably some land here in Porto Rico under Naval control and not urgently needed for Naval purposes could be traded



for the required site. Lines of telegraph poles extending from the site to both San Juan and Cayey are available without cost for carrying telegraph and control wires for the stations.

12. In order to be able to make an exchange of property if found necessary it is requested that everything possible be done to expedite the passage of the legislation described in the inclosure."

And again the defendant succeeded in having the machinery in Washington moved according to his plans. The Bureau of Steam Engineering, on September 24, 1919, said:

"Forwarded, recommending that steps be taken toward selection of site for remote control station in Porto Rico and for erection of same.

S. W. BRYANT,  
*Acting.*"

And the Director of Naval Communications said:

"Forwarded, recommending that steps be taken by the Bureau to have the legislation suggested in the above letter submitted to Congress.

E. B. WOODWORTH,  
*By Direction.*"

It was not necessary to take steps for the selection of the site. They had been taken already. The board named by order of the defendant of September 15, 1919, made this report on October 25, 1919, recommending the site at Loiza, the same referred to in the letter of the defendant of September 16, 1919—the municipalities of Loiza and Carolina are contiguous—for the construction of the distant control radio station. The last paragraph is as follows:

82 "13. The land on which the site is situated is valuable sugar land, and the cost of purchase of about eight acres on which to locate the buildings and the cost of a perpetual concession to plant underground receiving wires in any part of the surrounding 200 acres would total between \$5,000 and \$10,000. It is possible that this expenditure might be avoided by exchanging other land in Porto Rico, under the control of the Navy and not needed for Naval purposes, for the above-described site and con-

cession. If that could be done, the cost of the Station, including buildings, control wiring, etc., would not exceed fifty thousand dollars (\$50,000.00)."

On October 27, 1919, the defendant sent the report to the Bureau of Steam Engineering with the following endorsement: "Forwarded, approved." And on the same day, October 27, 1919 the defendant sent to the same Bureau a letter on the following subject: "Proposed exchange of small section of San Geronimo Reservation and distant control station", as follows:

"1. In obedience to reference (b) there is forwarded herewith complete description and charts of the site recommended in reference (c) for a receiving and distant control radio station, and also a chart, inclosure (2), showing a small section, in red lines, of San Geronimo reservation, which it is proposed to exchange for the site for the receiving and distant-control station.

"2. The desirability of the site which it is proposed to acquire is explained in reference (c). The land on this site is rich sugar land under cultivation, and would cost, if purchased, about \$300 per acre. Inclosure (5) shows the location, surroundings, size, and shape of this site which has a total area of about 8 acres, and a value of about \$2,400. To this should be added the value of a concession or lease for laying the ground receiving system, making a total value of about \$4,000.

"3. A large part of that section of San Geronimo reservation proposed for exchange is low and marshy and has little value and would never become of much value until a large amount of expensive filling and grading has been done. Its location is such that it would not likely ever be of any Naval use. The total area of this section is about twelve acres of an average value of about \$200 per acre, and a total value of about \$2,400."

"4. Preliminary investigation indicates that, by conducting the transaction through a third party, complete title to the site described in paragraph 2 above, and in inclosures (1) and (5), can be secured in exchange for the section described in paragraph 3 and shown in inclosure (2), and that, in addition, there can be obtained a perma-

83      nent lease or concession on the land throughout a radius of  
          2,000 feet around the radio station site sufficient for  
          the installation of the underground receiving system.

“5. In case the Bureau approves the selection of the site described in reference (c) it is requested that authority be given to proceed immediately with negotiations toward obtaining title to the site, and also the lease as described above, in exchange for the designated part of the San Geronimo Reservation, and that Congress be requested to pass the necessary legislation as described in references (a) and (b).”

This letter contains one of the strongest false representations made by the defendant, and one of those that had the greatest influence in Washington. The one that fixes the value of the lands at San Geronimo at two thousand four hundred dollars.

On the 6th of November following a public document was signed between the Loiza Sugar Company, represented by its president, Enrique Gonzalez, and the Navy Department of the United States, represented by the defendant, *giving the Navy the option to purchase the land on which to construct the distant control radio station, together with easements to lay and maintain underground wires on adjacent land with a radius of two thousand feet, at a price of two hundred dollars.*

On November 18, 1919, the Bureau of Steam Engineering sent to the defendant the following radiogram: “*For what figure can recommend distant control site be purchased including perpetual easement. . . . . Board figure is five to ten thousand . . . . . Probably great delay obtaining exchange legislation.*” And without communicating anything to the Bureau regarding the option obtained, the defendant answered on November 20, 1919, by letter and by radio.

Among other things in his letter he said:

“*It is strongly recommended that the necessary legislation be obtained authorizing the exchange of a small section of Navy land for complete title of the radio site and the easement . . . . . In addition to reducing materially the total cost of the distant control station, the exchange of the low marshy portion of San Geronimo*



84 . . . . . would provide for its being put into sanitary condition, which the prospective purchaser proposes to do. . . . . At present it is a breeding place for mosquitoes and flies which are blown directly into the San Juan Radio Station. . . . . Any delay in . . . . . legislation need not delay the construction . . . . . as arrangements can be made to transfer to the Navy full title . . . . . in advance of the passage of legislation."

It seems well to notice here that the defendant testified under oath at the trial not only that he did not have in mind himself for the exchange of the lands which he had been proposing and that he was not thinking of San Geronimo, but of Aibonito; but also that on that date he did not know who was the prospective purchaser mentioned in his letter. How is it possible to give credit to testimony so contrary to the facts as inferred from the acts of the defendant himself?

The radiogram was as follows:

"Total cost cannot be ascertained until owners know exact terms, etc., of perpetual lease to bury wires on surrounding land. Request that blank form of lease desired be forwarded by mail. In meantime to protect Government against speculations *I will obtain option* on site to be purchased. Option to provide for Navy obtaining full title to land as soon as desired, but payment for same will be deferred until Congress approves exchange, or failing that a fixed purchase price to be paid."

The Bureau insisted on the purchase and on the following day, November 21, 1919, sent the following radiogram to the defendant:

"*For what figure can eight acre tract be purchased regardless lease surrounding land. Lease need only provide for burying cable and replacement when necessary, lease need not be perpetual but can be renewed periodically if desired. Option covering eight acre tract must not commit Government to buy or exchange. Question of exchange may not be submitted to Congress if practicable to purchase. If impracticable to lease surrounding land loops can be used.*"

Everything was settled. It would have been enough that the defendant communicate to his principal the option which

in his name he had obtained for the matter to be satisfactorily started. But that destroyed entirely the plans of the defendant and he did not do so, and as he did not  
85 answer, on November 29, 1919, the Bureau of Steam Engineering sent him the following radiogram:

“Acknowledge Buseng 16,521 immediately and furnish data requested therein as soon as possible.”

On the same day, *without referring to the option* the defendant answered in the following manner:

“Hope to have definite information by December 6th. Indications are that *will be able* to obtain both entire site and easement *for nominal sum* probably not exceeding \$300.00; provided no work is begun on site before crops gathered. Am awaiting definite reply from directors of Sugar Company who own site.”

And on December 3, 1919, also without referring to the option of November 6th, 1919, without giving to the Bureau the information asked for, without again approaching the owners of the lands in Loiza in order to settle by a purchase in which the price would have been more or less high, any difficulty that might have arisen, communicating the result to Washington, he sent at last his direct proposition, as follows:

“1. Your approval is requested of the transfer to me by permanent title, or by permanent lease, subject to certain conditions during war, of the small tract of land on which I have been granted a five year lease by the Navy Department for a nominal sum.

“2. In return for such permanent title or lease I would obtain immediately and transfer to the Navy Department full title to the nine acre tract of land already selected as a site for a receiving and distant control radio station in Porto Rico. In addition, I would obtain immediately and transfer to the Navy Department perpetual easements for laying the underground receiving systems in the surrounding tracts of land included in a circle whose radius is 2,000 feet and whose center is at the point on the radio site where the radio building is to be located.

“3. Options have been obtained which enable me to make these transfers to the Navy Department immediately, so

that any delay necessary to transferring to me title to the tract of land I have leased need not delay the construction of the distant control station.

“4. On the tract of land on which I have the lease I wish to build a residence for my personal use and to make sanitary and other improvements amounting to over \$12,000, and permanent title to the small tract of land is desired in order to protect that investment.”

86 “5. I would agree to waive commutation of quarters while occupying the property, and, in time of war to place at the disposal of the Department, free of cost, the entire property, and all improvements thereon, including the residence.

“6. Whether retained on active duty or not I intend to remain in Porto Rico, and shall always consider myself available for orders to active duty in case I am needed.

“7. It might be of some advantage to the service to have living adjacent to the Naval reservation a retired officer who would be at all times available for active duty if needed, especially as there is no other permanently commissioned line officer of the Navy stationed or residing in Porto Rico. Such was the case at the time of our entry into the war with Germany, when I was immediately ordered to active duty and was given charge of all the activities of the Navy on shore in Porto Rico. These included Naval Communication, Cable Censorship, Naval Intelligence, Routing of Vessels, and Mail Censorship.

“8. Attention is invited to the fifth paragraph of the lease I now have, which reads, “This lease is made pending complete transfer by Congress of title to the lessee, which transfer meets the approval of the Navy Department.”

The petition was, on the following day, “forwarded, strongly recommended” by the Governor of the Virgin Islands.

And the Bureau of Steam Engineering said:

“1. Forwarded.

“2. The Bureau sees no objection to the granting of indefinite lease to Lieutenant-Commander V. Baker, U. S. N., (retired), to the portion of land on San Geronimo Reservation described herein. It would be of great value to the Navy to obtain the ownership of a suitable distant control



site without cost to the Government, as the establishment of a distant control station in Porto Rico is now approaching final decision.”

The defendant did not remain inactive. He again went to Washington personally and there on December 15, 1919, addressed the following letter to the Secretary of the Navy:

“1. In order that the lease to me, dated August 26, 1919, of a tract of land within the San Geronimo Naval Reservation, San Juan, Porto Rico, may be given effect as a permanent transfer of the title to me, which permanent transfer by Congress is contemplated by reference (*d*), it is requested that the Department submit the matter to the Congress with recommendation for legislation in effect as follows:

87      ‘That, for the purpose of acquiring a suitable site for a receiving and distant control radio station in Porto Rico, the Secretary of the Navy be and hereby is authorized to exchange any land under Naval control in Porto Rico not otherwise required for Naval purposes, provided that in time of war only if necessary, the Navy Department shall have without cost, free and unlimited use of any land so sold or exchanged.’

“2. As explained in reference (a), and approved in references (b) and (c), respectively, by the Naval Governor of the Virgin Islands and the Chief of the Bureau of Steam Engineering, the transfer of said tract of land to me involves on my part the obligation to transfer to the Navy Department complete title to a selected tract of land as a site for a distant control radio station in Porto Rico, which transfer of title I shall execute immediately in view of the addendum of this date to said lease and in advance and regardless of legislation as requested above.”

And on the same day, December 15, 1919, he signed with the Secretary of the Navy the following addendum to his contract of lease of August 26, 1919:

“In view of the providing, for a nominal sum, by Lieutenant Commander Virgil Baker, U. S. Navy (Retired), of a site of a distant control radio station in Porto Rico for the Navy Department, it is recommended that the above described lease be renewed by the Navy Department from time to time, on the expiration of each five year term

thereof, upon request therefor by the said Lieutenant Commander Virgil Baker, U. S. Navy (Retired), or his legal heirs and it is hereby made a part of the above described lease and agreement, that, should the Navy Department find it necessary to resume control, other than temporary control in time of war, of the tract of land described by said lease, then the said Lieutenant Commander Virgil Baker, U. S. Navy (Retired), or his legal heirs, shall be reimbursed for the cost of any and all improvements made by him or them to or upon said tract of land, subject, however, to approval by the Congress of this stipulation and appropriation of such sum as the Congress may determine to be proper."

And again the authorities in Washington, abandoning the road of good sense which is seen to arise from time to time during all of this process whenever the bureaus act on their own judgment, again, we repeat, the said authorities persuaded by the false representations of the defendant, took another step forward on the wrong road and toward the contract of lease for 999 years.

88 This is inferred in comparing the language used in the addendum with that employed by the defendant in his radiogram of November 29, 1919, and in his letter of December 3, 1919. It will be remembered that the defendant was placed in a difficult situation by the radiogram from the Bureau of Steam Engineering of November 21, 1919, which he failed to answer immediately and at last as a reply sent a radiogram and shortly afterwards his personal proposition. "Indications are that *will be able to obtain* both entire site and easement for nominal sum," said the defendant in his radiogram, and in his letter he said: "Options have been obtained *which enable me* to make this transfer to the Navy Department immediately." The defendant represented himself as in a position to secure the option or options which would permit him to transfer the land at Loiza to the Department for a nominal price, while the evidence shows that the Department itself had secured the option. And under the false impression that the defendant was the only one who could make the transfer, it stated in the addendum: "In view of the providing, for a nominal sum, by Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), of a site . . ." We shall have oc-

casion to refer later to other documents which make this point clearer. It is enough for the present to call attention to it.

Having left that impression in Washington, the defendant returned to Porto Rico and immediately renewed negotiations with the Loiza Sugar Company. Of the result obtained the minutes of said corporation of December 24, 1919, speak for themselves, as follows:

“I, Abelardo de la Haba, acting secretary of the Loiza Sugar Company, hereby certify that in the Book of Minutes No. 2 of this Corporation, folio ninety-eight, there is a resolution of a regular meeting of the board of directors held on the twenty-fourth day of December just passed, which has, amongst other particulars, the following, to wit:

89     The president informs the board of directors that Lieutenant Commander Virgil Baker, U. S. N., had made propositions that the corporation Loiza Sugar Company should cede two parcels of land of eight and one cuerdas, respectively, at a place close to the factory of the Central and on the right shore of the Rio Grande de Loiza, for the purpose of installing and maintaining a wireless station which would be in communication with the other stations installed on this island, and also that on the lands close to the said two parcels, within a radius described by a circle of 2,000 feet from a point to be determined within the said station the Loiza Sugar Company were to create an easement in favor of the said station authorizing it to place and maintain underground at a depth of not less than three feet below the surface electrical conductors, in case that it should be deemed necessary for the operation of the referred to wireless station; the officer, at the same time, offering to make to the corporation payment for the value of the land plus additional consideration for the easement. After having duly discussed the subject, together with the report and particulars of the transaction furnished by the presidency, the board, having taken into consideration the general convenience that appears for the Central from the existence of the said wireless station, and taking into consideration its purpose to cooperate always within its means with all work which may be beneficial to the people of Porto Rico, agree unanimously, in view of the powers and faculties granted to it by section 16, of the articles of incorpora-



tion, to carry out all such acts which the corporation could carry out by itself, to transfer by title of sale, and for a round price of two hundred dollars the two parcels of land of eight and one acres respectively, which are required by Lieutenant-Commander Virgil Baker, U. S. N., for the purposes above named, and with this reservation, that the said land be sold back to the Corporation in case that the installation of the Station should not be carried out or in case that the maintaining of the same should not be continued after such installation; and this it also agreed to create on the adjacent land to the said two parcels, which are the farm 'Cacique' acquired from Rubert Gonzalez & Company, on the right shore of the Rio Grande de Loiza, and the second parcel from the farm 'Buena Vista,' parcel situated within the district of Loiza, acquired by purchase from Sobrinos de Ezquiaga, on the left shore of the said river, and easement allowing the maintaining underground of a wire or of any other means of conducting electricity to the said station; the acting president, Mr. Enrique Gonzalez, being especially authorized as a result of this resolution, to execute the deed of sale and of the creation of easements necessitated by the transaction together with all the agreements, stipulations, and any other particulars which, in his judgment would be useful for the carrying out of the said resolutions; all of which without hindrance to the fact that, at a proper time, he must give notice to the general meeting of stock holders of the transaction carried out by the board in the exercise of the powers and faculties conferred on the same by the section 16 of the Articles of Incorporation. And for the execution of the title of

90 sale and of the creation of the easement mentioned

I authorize these presents with the approval of the acting president in San Juan, on the third day of January, nineteen hundred and twenty. Signed, A. de la Haba, acting secretary. Approved, signed, Enrique Gonzalez, acting president."

On January 9th, following, the deed of sale was signed before a notary public. This contract contains the following clauses:

"Fourth. The present sale is carried out with the condition that the purchasing party Lieutenant-Commander Virgil Baker, U. S. Navy (Retired), will transfer the par-

cels in question to the Navy Department of the United States within the term of one year, to the effect that the said department will utilize the said parcels in constructing and maintaining in operation therein a wireless station within a term of two years following the date of transfer; it being stipulated that if the said wireless station should not be constructed within the said term of two years, then the purchasing party or his successor in title will return to the Loiza Sugar Company the parcels of land now sold for the same consideration of two hundred dollars which have now been paid for them, and it being equally agreed in the same manner and for the same price that, in the event of abandonment or transfer of the said station to any other place after its construction and operation, the improvements and structures of the said wireless station shall become the property of the Loiza Sugar Company if they shall not have been removed within a period of three months following the date of the return of the property in each of the two cases above stated.

“Fifth. It is agreed also as a condition of this contract, and in connection with the wireless station to be built, that the Loiza Sugar Company will be free and exempt of all responsibility by reason of damage of any kind that said station might cause to third parties.”

Although the deed of sale appears to be directly from the corporation to the defendant, the lengthy documentary and oral evidence examined reasonably shows that the corporation always thought that it was contracting with the Government of the United States and that for that reason, and because of the nature of the work to be done, and not to the personal participation of the defendant, was due the fixing of a nominal price. And it seems proper to state here that, analyzing carefully all of the evidence, it is plain to me that the question of the exchange of its land for federal

land was never proposed to the corporation, nor was  
91 discussed directly with it the question of its being  
necessary for the defendant to receive the title in  
order that he should assume the responsibility for damages  
that the Government could not assume. The Court does  
not believe the testimony of the defendant to the effect that  
he spoke about such matters with Mr. De la Haba and came

to an understanding with him. Nothing appears in writing; nothing was communicated to the board of directors according to the minutes; no agreement was reached about a question of such importance, and no document was written. The testimony of Director Suau is conclusive; the testimony of Mr. Acuna shows it, and Mr. De la Haba was dead when the defendant testified.

The same day on which the deed of sale was executed, before the same notary, another deed was executed constituting an easement over a certain portion needed to complete the radius of the required 2,000 feet, *in consideration of the amount of one dollar*, which the defendant paid.

The defendant and his wife then transferred, on January 21, 1920, to the Navy Department, what they acquired by the deeds, omitting in the deed of transfer the clause relative to the responsibility for damages. The Loiza Sugar Company did not appear in the execution of this new deed. In the letter remitting the document the defendant said that he had paid the purchase price of the tracts of land and of the easements, all notarial and other fees, and also settling all claims (about \$160.00) for seed, cane, fruit, etc., of the farmer who had planted the land purchased, and requested that Congress be urged to enact the legislation necessary.

Before the document was received in Washington the Secretary of the Navy had addressed himself, on January 22, 1920, to the Speaker of the House of Representatives, as follows:

92       “Enclosed herewith I have the honor to transmit a proposed draft of bill enabling the secretary of the Navy to acquire a suitable site for a receiving and distant control radio station in Porto Rico.

“The radio station now established on the Naval Reservation in Porto Rico is a very important one, and for its efficient operation a receiving and distant control station must be far enough removed from the transmitting apparatus to avoid interference by the sending out of the electric impulses with the receiving of incoming messages, and there is not room enough on the Naval Reservation to admit of the establishment of this necessary adjunct on Government owned land.



“A board was appointed by the Department to select a site for said purpose and the site chosen is part of a sugar plantation in the vicinity of the Reservation, and is admirably located for the purpose. It is necessary also that the privilege be obtained of laying wires underground surrounding the receiving station within a circle of long radius, and the land on which this right or easement should be exercised has also been selected by the board.

“Said tracts of land are owned by two corporations and the price at which they offered to sell the Government the title and the easement respectively was, though perhaps not more than the actual value, a considerable sum, aggregating as tentatively stated somewhat more than \$5,000.00.

“Commander Virgil Baker, who prior to the outbreak of the War was on the retired list and living in San Juan has been recalled to active duty and is in charge of the wireless station on the Naval Reservation. He has a wide acquaintance on the Island and through his friendly relations with the heads of the two sugar companies he was able to secure from them the consent of the companies to part with the desired site in the one case and to grant the requisite easements in the other case for the Government's uses, for nominal consideration. Previously to this, however, that is under date of the 26th of August last, the Department had in accordance with existing law leased to Commander Baker for a period of five years a small tract of unused and unserviceable land within the Reservation because of his highly valuable services during the period of the war and of his fine previous record of service, and because of the advantage to the public interests of having resident in Porto Rico an officer of the Navy who might, in case of need, be called on for duty when the circumstances might readily be such that another officer would not be available.

“The tract leased to Commander Baker, as stated above, is of no practical value to the Government for any other purpose and the site selected for the receiving and distant control radio station is greatly needed and therefore of very considerable value to the Government. The arrangement made with Commander Baker is for him to acquire the land and easements desired for the station by direct negotiation with the present owners and transfer them immediately to

93 the Government, assuming himself certain guarantees demanded by the owners against injuries to crops, persons, and livestock resulting from the laying of underground wires and the operation of the station. This guarantee the Department could not undertake and the assumption thereof by Commander Baker was another act on his part of distinct value to the Government. The Arrangement also contemplates that the tract heretofore leased to Commander Baker for five years with the power of the Department under the law as it now stands to renew the lease from time to time for such further periods not exceeding five years as it might elect, if prior authorization by Congress can be obtained be leased to him and his heirs indefinitely or permanently transferred to him.

“The Department feels that the interests of the Government would be most advantageously served by the carrying out of the arrangement indicated above, and, as Commander Baker is proceeding with his part of the undertaking and will transfer the property in question to the Government in consideration for the Department’s mere promise to endeavor to obtain authority for the transfer to him permanently of the leased tract and to recommend that future administrations of the Navy Department extend the lease from time to time in case such permanent transfer may not be effected, a procedure that will subject him to some considerable expenses and obligate him to protect the present owners of the new site against damages, the Department earnestly recommends that it be empowered, both on account of the advantages to be secured by the Government as indicated and as a recognition and reward to an efficient and zealous officer, to exchange the small tract heretofore leased to Commander Baker for the important and valuable property and rights to be secured in that way, and it is urgently requested that provision in effect as embodied in the draft herewith be enacted.”

The letter is signed by Josephus Daniels. There is not the slightest suspicion or the remotest idea of a conspiracy between the Secretary of the Navy and the defendant.

The Secretary of the Navy communicated to Congress information which he thought was true, believing that he was acting justly; that he was doing something worthy and

meritorious, and nevertheless, in fact, by virtue of the contrivance of the defendant, he was the instrument used to induce Congress to pass an act giving validity to a real spoliation.

When the deed of transfer reached the Navy Department it was sent to the Attorney General who found some defects in it.

94 In the meantime, on January 27, 1920, the defendant was relieved from active duty and was succeeded by Lieutenant McWhorter. The order relieving him had been communicated on November 8, 1919, to be effective on December 31, 1919.

The evidence shows that although Lieutenant McWhorter acted as the senior member on the board that selected the site at Loiza and his signature appears on the report, the truth is that the recommendation that the report contains was not a deliberate product of his mind. Regarding this point he testified at the trial as follows:

“Q. Now, state again for the record, in detail and as accurately as you can recall, the circumstances of your meeting him and what conversation, if any, was had with respect to your serving on a Board for the selection of the Loiza site. A. It must have been only a short time or some time prior to the appointment of the Board. I was in San Juan on the station when Commander Baker said to me that he wanted to appoint a board for the selection of the site for a remote control station and that he intended to make me senior member of the board. He said further that he knew I was busy getting the Cayey station in commission and that he would do the work in connection with it. However, he wished when I had an opportunity or time to go around and look at the various sites. In the same conversation he said that he could appoint himself senior member of the Board but did not care to, or words to that effect.

Q. Did he at that time say anything as to who was to write the report? A. The report was mentioned in that conversation, the writing of the report was mentioned.

Q. Did the defendant say to you that he would write the report? A. He said he would do the work and some reference was made to the report.



Q. Now, did you write the report as senior member? A. I did not.

Q. Did you have anything to do with the preparation of the report? A. I did not.

Q. When and under what circumstances did you sign the report which is dated October 25, 1919, in evidence  
95 in this case? A. It was on another occasion of my visit to San Juan. Returning to Cayey late in the afternoon I stopped by the Radio Station and went into the office. Commander Baker was there and said that the report was ready for signature and he either handed the report to me or laid it before me on the desk and I looked the report over.

Q. Then what happened? A. As I stated before in my previous testimony, I questioned—I wouldn't say questioned, I hesitated on account \* \* \* prior to that, to get things straight in my mind, I had passed the Loiza site at least on two occasions with Commander Baker and I was slightly confused in my mind as to the exact site. I asked him on that point and he explained it to me and I understood then thoroughly well which site it was. Then in the same conversation I brought up the condition of the roadway as to inundation.

Q. When you signed the report was the defendant Virgil Baker present? A. He was."

It seems convenient to state here that in his testimony the defendant contradicted the testimony of Lieutenant McWhorter and that this conflict between the testimony of two men given before me led me—my mind being already filled with great doubts by the other evidence—in a definite manner to judge the defendant as a witness whose testimony could not be given full credit. On the contrary, Lieutenant McWhorter, by his firm and cool manner of testifying, by his face and his looks and his manner and reasonings, seemed to me to be one of those men who, when put under oath, only tell the truth, without being influenced to deviate from it by sympathy, friendship, spirit or even the fear of appearing in a disdainful position, failing in the accomplishment of his duties, signing as his something that was not. I observed him as well as the defendant and something like a sensation of repose comes to my conscience

when I rely on his testimony. The repairing power of Justice would not be possible if there were not characters like his.

96 On January 15, 1920, the Bureau of Steam Engineering sent a letter to the District Communication Superintendent of San Juan Radio Station, in which, among other things, it is said:

“The site selected on the Loiza Sugar Company’s plantation, for a distant control and receiving station for the Cayey and San Juan stations, as referred to in the above references, meets the approval of the Bureau.”

Lieutenant McWhorter must have found this letter in his office or must have received it immediately after he took charge, and when he came in direct contact with the site at Loiza the doubts that he had from the beginning increased in such manner that he decided to send to the Bureau of Steam Engineering, on February 29, 1920, the following radiogram:

“Recommend final arrangements for acquisition of site at Loiza for receiving station be withheld pending receipt preliminary plans and recommendations now under preparation covering this section. Preliminary report follows next mail.”

The report mentioned is contained in his letter to the Bureau of March 1, 1920, which states: “In the preparation of preliminary plans \* \* \* certain undesirable features pertaining to the site have developed \* \* \* as follows.” Enumeration and reasoning covering the following points follows: that the proposed site at Loiza is not adapted to the location of the distant control station because of insufficient depth and size of parcel between the road and the river; that the road leading to site is frequently inundated; that it would be necessary to provide an independent water supply system; that the cost of control wires to San Juan and Cayey would be too great; that when the site was selected consideration was given only to underground system, and for this purpose the site offers no advantages over other sites more centrally and favorably located, and that there are no nearby towns offering

any places of amusement so necessary for contentment of personnel. He recommended the selection of a new site. The report covers five pages.

Notwithstanding his report, he continued working and on March 13, 1920, he sent the plans and estimates covering the establishment of the station.

Then on March 24, 1920, the defendant sent a letter to Commander Hooper, in the Navy Department, which begins: "My dear Hooper," and contains the following paragraphs:

"1. I have had an inkling that interests are possibly at work to try to discredit the project for a distant-control and receiving station the plans for which were well under way when McWhorter relieved me here the latter part of January. I was informed when I was in Washington in December that the Bureau was anxious to complete the plans as soon as possible in order that funds available under this year's appropriation could be used.

"8. I am interested in the present site for the reason that I know the urgent need for a more efficient system of radio communication here in Porto Rico in peace times as well as during war. Also, I spent considerable time and hard work, and at least two trips to Washington at my own expense, in order to complete the arrangements for construction of the station. And I consider any activities that tend to delay or prevent the building of the distant-control station to be of great disadvantage to the Service."

And on the 26th of the same month and year the defendant sent him a telegram which reads:

"Strongly suspect that distant control site recently acquired is being grossly misrepresented to Department and that activities harmful to Navy are endeavoring delay indefinitely or perhaps entirely prevent establishing distant control system in Porto Rico. Request copies all dispatches and letters derogatory to selected site be forwarded to me by mail steamer sailing from New York noon Saturday, March twenty-seventh, in order that I may furnish you accurate estimate of situation without delay."



On March 26, 1920, an answer was sent to the defendant, enclosing copies of the letters of Lieutenant McWhorter. It was signed by R. S. Griffin, Engineer-in-Chief of the Navy and Chief of the Bureau of Steam Engineering.

On April 14th and 18th, 1920, the defendant wrote letters to Commander Hooper in which he referred to the  
98 communications of Lieutenant McWhorter and answered his criticism of the site at Loiza. In the letter of April 18th there is a paragraph which reads:

“In regard to the estimates of cost in McWhorter’s letter of March 13, 1920, I have consulted with Lieutenant R. L. Pettigrew, (C. E.), U. S. N., the Civil Engineer at St. Thomas, and he estimates that the station can be constructed under the supervision of a Navy Civil Engineer for at least one-third less than the estimates mentioned above. I would strongly suggest that Lieutenant Pettigrew be put in charge of the construction, if practicable. He seemed to believe that a competent civilian could be employed who could take care of his work at St. Thomas while he is building the Loiza Station.

“I believe the above remarks answer all the criticisms of importance, but if there is any further information that I can furnish I shall be glad to do so.”

On June 7, 1920, another deed was executed by the defendant, in which the comments of the Attorney General of the United States were taken into consideration. This new deed was not sent to the Attorney General for examination. Like the former, it contained the same condition as to repurchase by the Loiza Sugar Company in case of abandonment or failure to erect the station within two years and the same stipulation that the improvements and structures not removed within three months from a specified time should become the property of the Loiza Sugar Company. With the new deed the defendant sent to Washington the form of acceptance preferred according to the laws of Porto Rico.

It is not possible, without lengthening still more this very long opinion, to refer in detail to all of the documents and specify the details of all of the facts. It will be sufficient to say that steps were taken for the construction of the

station at Loiza. Specifications for the buildings and utilities were published and propositions were received, but the fact is that said construction was abandoned about the month of June, 1920.

99        Why was it abandoned? On account of the adverse report of Lieutenant McWhorter? On account of a certain investigation made by Dr. Austin of the U. S. Naval Radio Research Laboratory, Bureau of Standards, showing that the site at Loiza was inferior to that of Cayey, or at the most equal to San Juan for radio reception purposes? On account of the excessive cost? Because it was not really necessary? It is not clear that it was on account of any one of these circumstances. Perhaps they all contributed, especially the lack of a real and urgent necessity, for, there being two stations constructed, they could be combined, as they were, for sending and receiving messages.

The first document in which the abandonment is mentioned is a memorandum from Admiral Griffin to Admiral Parks dated June 19, 1920, in which the following is said: "As a 1920 project Loiza should be cancelled. We may want to take it up later or next year."

On August 13, 1920, in a document signed by Admiral Griffin and addressed to the Governor of the Virgin Islands, showing a complete and combined study of the radio telegraph and radio materiel activities in the West Indies, it said:

"13. It has been practically decided not to establish the proposed joint distant control and receiving station for the Cayey and San Juan stations at Loiza, but to consolidate the Cayey and San Juan transmitting stations at Cayey and control them from San Juan instead \* \* \*"

In another document containing the outline of radio work for the fiscal year 1921, dated August 16, 1920, and addressed also to the Governor of the Virgin Islands by Admiral Griffin, the following is stated:

"The Bureau considers the expenditures necessary to establish a joint distant control and receiving station at Loiza for the Cayey and San Juan station, as discussed in other correspondence, to be not justified, at this time, and desires that instead the Cayey and San Juan transmitting stations be consolidated and controlled from San Juan.

The land at Loiza which has been obtained for this purpose will be retained for possible future use as a site for a control station.”

And there is a letter received by the defendant dated June 30, 1920, and signed “McConnell,” the pertinent part of which is as follows:

“I had a long talk with Hooper yesterday and he says the Bureau has decided that they will not build the distant control station at Loiza this year. They believe that by removing the transmitter from San Juan to Cayey they can distant control both of these from San Juan and get the same results without the additional expense of some two hundred thousand dollars. I told him that I did not expect the best results from this arrangement and believe that he would have to put in a distant control station at some date in any case. He has, however, decided to give the thing a trial during the current fiscal year and make up his mind about it as a result of such trial. He is holding Loiza for future development. Of course, if they can get the same result by moving the San Juan transmitter to Cayey that is the best solution as we save the expense of the installation at Loiza.

“I asked about Dr. Austin’s report. Hooper says that Austin made no adverse report against Loiza except that the receiving conditions were equally good at San Juan and better at Cayey. The Bureau regards a distant control station in the mountains as being out of the question inasmuch as it would be too near to Cayey.”

At this stage, Loiza being abandoned, apparently for the moment, and in fact for all time, without the Attorney General of the United States having rendered an opinion in regard to the new deed and there being no law authorizing the purchase, the defendant succeeded in having the Secretary of the Navy accept the transfer of the lands at Loiza on August 19, 1920. And thus was consummated the fifth step toward obtaining the so-called contract of lease for a term of 999 years.

The deposition of Secretary of the Navy Josephus Daniels who accepted the deed expresses clearly and conclusively the state of his mind and the idea that he had of the matter.



It reveals the full effect produced by the false representations of the defendant and that without them his purposes would not have been effective.

The statements of Secretary Daniels are of decisive importance in this matter. They are as follows:

“Q. Now, Mr. Daniels, you state that that option contract had never been called to your attention? A. No; not to the best of my recollection; nor had I ever heard, to my recollection, of anything that the Loiza Sugar Company had to do with it. I didn't know anything about that.

Q. The records in this case disclose, that is to say, the records already in evidence disclose, that after Lieutenant Commander Baker had acquired that option, and after the letters which were sent to Congress under your signature were mailed, he acquired title to this property in his own name, and not in the name of the Navy Department. Did you know that? A. I didn't know anything about that. I did not suppose the officer that Admiral Griffin was talking about was getting anything for himself of any value; I thought that he was serving the Department by making a guarantee which we could not legally make. It never entered my head that anything was being done by which he could get pecuniary profit or advantage. If I had known it, I should never have accepted the deed, or have had anything to do with it.

Q. Mr. Daniels, from official documents now in the record in this case, it appears that on January 22, 1920, and again on December 13, 1920, you wrote a letter to the Speaker of the House of Representatives, recommending the passage of legislation which would give the Navy Department authority to convey or lease property in San Juan in exchange for a radio station site and easements in connection therewith. Will you state what particular person, if you had in mind any particular person, you desired to make this transfer to? A. I had no person in mind. I wrote that letter in order to enable the Bureau of Engineering to carry out its desire to have a distant control radio station.

Q. Inviting your attention again to the deed, and to another clause therein, I will ask you if your attention was in-

vited to the provision in the deed to the effect that in the event of the abandonment or transfer of said station to any other place after the construction and operation, the improvements thereon shall become the property of the Loiza Sugar Company, if they shall not have been removed within three months after the date of the return of said property?

A. No.

Q. You are aware, of course, Mr. Daniels, that no executive officer or administrative officer of the Government has authority to convey, grant, or cede away property of the United States, except by authority of Congress? A. Yes.

Q. If your attention had been called to this provision in the deed, would you have accepted the deed in that form?

A. Well, I never heard of Loiza Sugar Company in my life before. I should not have accepted the deed, if I had supposed there was any financial profit to any Naval officer.

Q. Mr. Daniels, if you had known the fact that the plan as actually followed out, or rather the deed as actually drawn, would contain a reverter clause, providing for the reconveyance of said tract for the price paid, in the event the radio station was not built in two years from January 9, 1920; and that in the event of abandonment, any property not removed within three months should vest in the Loiza Sugar Company, would you have felt it your duty or not to apprise Congress of that fact? A. I certainly would have.

Q. And at the time you wrote this letter, you did not know that to be a fact? A. I was not advertent to it.

Q. And had you known that the acceptance of the deed of June 7, 1920, would have resulted in the conveyance to Lieutenant Commander Baker, (Retired), of approximately 19-1/3 acres of land in the City of San Juan, for whatever he did in connection with the acquisition of the property at Loiza, would you have signed the deed, or accepted it? A. I would not have signed it, if I had known that it was being given to him, and that it would revert to his personal pecuniary value, other than a place to build him a house on."

"I was assured that the lands were of negligible value, . . . . . It never occurred to me that the lands were of

any value, except nominally; and if I had known that they were worth as much as \$25,000.00, or even as much as \$10,000.00, I would never have accepted the deed. I thought it was an exchange for guarantees, without carrying any profit whatever, to the pecuniary advantage of any Naval officer or anybody else."

"The legislation was permissive and not mandatory. If the matter now had come to my attention that there was in this lease or exchange any possibility, even remote, that the transfer would inure to the financial benefit of a Naval officer, I would never have concluded the transaction, and would have repudiated it from the beginning. I was very well advertent to the fact that *no Naval officer or officer of the Government was entitled to any money, profit or pay of any kind in addition to his salary*; and I was not  
103 *willing to ask Congress to change this policy* \* \* \*

It never occurred to me, nor do I think any Naval officer in the Department thought, that they were transferring to a Naval officer receiving pay from the Government, property that would inure to his personal financial profit."

"I do not regard section 5 as at all mandatory; and that if I had to act under it with the information I would have obtained after investigating the value of the property, and that if I had found that any Naval officer was to receive pecuniary benefit, I would not have leased the place under Section 5; but I would have asked Congress to make such compensation as conditions might justify. I mean by compensation, return for any moneys expended, because no compensation could go to a Naval officer; but if he expended money, I would have sought means to return it to him. You ask me if I would have deemed it improper. I say *it would have been decidedly improper for the Secretary of the Navy to have any agreements or understandings with any Naval officer to carry out any act of Congress, which gave compensation above the regular pay fixed by law for Naval officers.*"

Time went by and the Administration at Washington changed as regards the heads of Departments, but not as regards the subordinate officers in general.

They continued their efforts to secure the action of Congress and the record contains a certain memorandum in-



troduced in evidence by the defendant, dated May 14, 1921, and signed by Acting Solicitor Pickens Neagle, which in my judgment is of great importance because it shows the effect that the representations of the defendant produced in the Department. When in the said document it is read that: "Commander Baker has carried out his part of the undertaking in good faith" and the facts admitted as true are analyzed, among others that the "said tracts of land were owned by two corporations and the price at which they offered to sell the Government the title and the easement respectively was, though perhaps not more than the actual value, a considerable sum aggregating, as tentatively stated, somewhat more than \$5,000. Commander Virgil Baker \* \* \* was able by reason of personal acquaintance with the owners to obtain the land and easements for a smaller consideration, for the Government's use and conveyed them to the Government without charge," the grade of ignorance in which the Department found itself regarding the real facts is inferred and it is explained how it could act in the manner in which it did.

In his letter of June 29, 1921, which begins as follows: '1. As I intend to reside permanently in Porto Rico', the defendant insisted in his purpose, going immediately to Washington, and finally, on July 12, 1921, the act so long expected was passed, as follows:

"That as consideration for a suitable site and requisite rights, privileges and easements for a receiving and distant-control radio station in Porto Rico the Secretary of the Navy be, and he hereby is, authorized to exchange or lease for such period as he may deem proper any land under naval control in Porto Rico not otherwise required for naval purposes; *Provided*, That in time of war or national emergency, if necessary, the Navy Department shall have without cost free and unlimited use of any land so exchanged or leased."

And, finally, three days later, on July 15, 1921, the so-called contract of lease for 999 years was executed.

Can that contract hold good? In our judgment it cannot. It is fraudulent and therefore void.

In 1839 the Supreme Court of the United States, in the case of *Smith v. Richards*, 38 U. S. 26, 35 and 36, pointed

out the road and the light that should guide us in applying the law to the facts in this case, thus:

“Having come to these conclusions in relation to the facts of this case, the next inquiry in order is, what is the law of the case? It is an ancient and well-established principle, that whenever *suppresio veri* or *suggestio falsi* occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance

\* \* \* In I Story’s Equity, 201-2, it is thus stated: ‘Where the party, intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case, there is a positive fraud, in the true sense of the terms; there is an evil act, with an evil intent; *dolum malum, ad circumvenien-*  
 105 *dum*. And the misrepresentations may be as well by deeds or acts, as by words; by artifices to mislead, as by positive assertions.’”

The evidence would have been more complete if it had included the testimony of Acting Secretary of the Navy Theodore Roosevelt, who signed the contract with the defendant. It was announced by the defendant that his deposition would be taken. This was not done and the said official was absent at the time of the trial. However, other evidence, especially the deposition of Acting Solicitor Pickens Neagle, throws much light on the facts surrounding the signing of the document and on the state of mind of the Acting Secretary when he so acted. The official had occupied his position only a short time and we know the wrong impression which the defendant had succeeded in producing in Washington by his false representations regarding the value of the land at Loiza; the decisive importance which his presence had had; the responsibility that the defendant had contracted for the damages that might originate in the future; the negligible value of the land at San Geronimo, and his intention to improve it and build his residence thereon, always ready to lend his services to the Navy \* \* \* If the truth as revealed by the evidence had been known to Acting Secretary Roosevelt, he could have acted as he did only as an accomplice in the fraud to despoil the Government of the United States of a valuable piece of property, and it is impossible to imagine

even that this was the case. Anyway, the position of the defendant would not have changed and the cancellation of the contract always would have been required.

It has been said that as there exists an Act of Congress and it being impossible to inquire into its reasons for enacting it, this suit falls of its own weight.

106 It is not so. Congress did not transfer the reservation of San Geronimo to the defendant. Congress authorized the Secretary of the Navy to exchange or lease any land under Naval control not otherwise required for Naval purposes as consideration for a suitable site for a receiving and distant control radio station in Porto Rico. The matter was not settled in final and concrete form by Congress, much less personally. The Secretary was not obliged to act, and if he did he could do so only within the limits fixed by the law and in compliance with the purposes expressed therein.

The contract of July 15, 1921, says that it is executed "in consideration of the transfer, by the said Lieutenant Commander Virgil Baker, U. S. Navy, (Retired), and his wife, Stella May Baker, to the United States of America, represented by the Secretary of the Navy, of a tract of land and easements for a distant control radio station in Porto Rico, as described in \* \* \* and in further consideration of the payment this date to the United States of America of the sum of one dollar (\$1.00) by the said Lieutenant Commander Virgil Baker, U. S. Navy, (Retired); and in recognition of services rendered by him in the war against the German Empire and in other wars; and in recognition of valuable services rendered by him in May, nineteen hundred and twenty, while not on active duty, which services aided materially the U. S. Army Transport Northern Pacific, then stranded in a dangerous position on a reef off the Island of Porto Rico."

Omitting the consideration referring to the services of the defendant and the payment of the sum of one dollar which is not authorized by law, and at all events considering the record which shows what those services were and whether they merited special attention, we hold that the

evidence shows convincingly that the Secretary was  
107 not in a position to comply with the law, because the construction of the station was unnecessary and had been abandoned, especially taking into consideration that



what the defendant was transmitting was not a complete title, but a title subject to the condition that the station should be built within a period of two years.

In reaching the foregoing conclusion we have not forgotten what Admiral Griffin said in his deposition, nor what other witnesses said. The facts, however, are superior to words, and the facts, on August 19, 1920, on July 15, 1921, later, and at present, were that on account of a series of circumstances which appear from the record, the construction was abandoned.

What Admiral Griffin said on August 13, 1920, is conclusive. What was said in the document of August 16, 1920, regarding the land at Loiza is subject to interpretations, but the doubt disappears when the real situation is analyzed. On August 16, 1920, the Admiral said: "The land at Loiza which has been obtained," and at that time Secretary Daniels had not accepted the deed of sale. The letter of McConnell permits a look into its interior. The intervention of Hooper, and especially the impression, the false impression, which the defendant succeeded in producing in Washington, regarding his good faith and the justice of his petition, even to the limit of considering there that they were indebted to him, apparently resurrected a corpse, and such a thing is not permissible, nor admissible, nor valid when it involves the disposition not of one's own private property, but of property of the Government.

There is no doubt in my mind that it is a real fact, proved by the evidence, considered justly, firmly and without hesitation, that construction of the station on the Loiza tract was abandoned on August 19, 1920, and on July 15, 108 1921, and always, as reaffirmed by the circumstance of the Department's having allowed to elapse the period of two years without requesting an extension, and refusing later to solicit or accept a certain extension of time, the defendant acting of his own accord when he ascertained that a suit would be brought praying for the cancellation of the contract.

Besides, a detailed study of the history and the precedents allows one to affirm that this so-called lease for 999 years is contrary to the public policy of the American Government. It not only allows the enjoyment of property for more than nine centuries, but the concession also carries non-payment of taxes, placing the defendant, his heirs and

with it the non-payment of taxes, placing the defendant, his heirs and assigns in a privileged situation, without precedent and incompatible with the practices of a republican government.

The defendant seems to rely largely on the intervention which he attributes to the Naval authorities of the Virgin Islands in relation to his acts. Pages and pages would have to be written to analyze this intervention. It is not now possible. We keep to the record. It is enough to read Captain White's deposition. Very seldom can the mind of a witness be penetrated with more certainty than in this case. In the direct examination, and especially in the formidable cross-examination, it was shown that he was a witness to whom full credit could not be given. And that in him the defendant had an ally, innocent perhaps, whom he knew how to utilize to carry out his plans, is inferred by the examination of part of the evidence introduced, especially from the testimony of the defendant and of Captain White.

In many of the other depositions and testimony of his witnesses, a manifest desire to favor the defendant may be observed, especially in all of that which is opinion matter, and which tends to explain in the most favorable  
109 manner the acts of the defendant.

And we reach, finally, the letter of the defendant dated December 1, 1919, addressed to the Bureau of Steam Engineering purporting to invite attention to a typographical error to the effect that the statement contained in the letter of October 27, 1919, should have read \$2,000 an acre, making the total value about \$24,000.00. The original of said letter was not introduced in evidence. If there is any evidence at all it is that said letter was not received in Washington or acted upon. A copy found in the files of the Navy in the Virgin Islands was admitted, with great doubt on the part of the Court. That doubt has increased in such a manner that I cannot believe that this letter was written at the time it is dated and that it was sent to the Bureau of Steam Engineering. As the plaintiff contends, the letter "purporting to have been written on December 1, 1919, contains anachronisms, or information that could not have been obtained or known before the passage of the resolution of December 24, 1919, by the Board of Directors of the

Loiza Sugar Company, or the deed of January 9, 1920, had been executed." Besides, no mention is made of it in the correspondence following, as is the invariable custom in the correspondence of this case.

And the testimony of the defendant himself leads the Court to its final conclusion when he says:

"Q. In this radio (Exhibit #93) they request,—they state, that further action cannot be taken until information is received stating what land now under naval control is to be exchanged, the description of the land, and the values of both parcels, and ask you to forward maps with complete information. Now, did you do that? A. That is the dispatch 15,511 of October 11th. No, sir, I did not reply immediately because we did not have full information. The Board had not yet made its report, and I wanted to get its written report before making any further reports on the matter myself. As soon as that report was handed in I

110 told the Paymaster, who had been investigating this question of exchange of properties, etc., to prepare a letter in reply to this radio.

Q. Was such a letter prepared and sent? A. Yes, sir; he prepared the letter.

Q. Under what date? A. October 27th.

Q. Now, will you look, please, at United States Exhibit No. 98. A. Yes, sir, I have that.

Q. Is that the letter to which you refer? A. Yes, sir.

Q. Now, who did you say prepared that letter? A. Paymaster Cain, the pay officer of the station.

Q. You signed it? A. Yes, sir; I signed it; but I don't think I read it over carefully because at that time I had a great many papers and if I had read it over carefully I would have noticed the incorrect values that were stated in the letter. I am sure that I did not read it over."

For the judge before whom all the evidence was heard and who could notice the exclusive and personal manner in which the defendant conducted this long and complicated matter, the participation of Paymaster Cain, who was not within the reach of the Court, and the omission in reading the document, it is more than suspicious, it is unbelievable.

Besides, the facts show that it was never believed in Washington that the lands granted to the defendant were



worth twenty-four thousand dollars. It will be enough to remember the testimony of Secretary Daniels. If such data had really been sent to Washington; if such statement had really been made by the defendant, he would never have obtained what he secured.

And it is another circumstance which has to be considered that the statement that the lands at San Geronimo  
111 were worth two thousand four hundred dollars made in the letter of October 27, 1919, had a very close relation to the other statement contained in the same document regarding the value of the land at Loiza with those with which they were to be exchanged, viz: eight acres at three hundred dollars per acre, making a total of two thousand four hundred dollars.

To what is due the intervention of the Government of Porto Rico?

The eastern boundary of the reservation of San Geronimo was fixed by the first official documents, General Orders No. 97, July 7, 1903, "along the shore line of the Laguna."

When the defendant had already obtained the first lease and developed his plans to obtain the definite grant, he received a letter from the Bureau of Steam Engineering, dated September 20, 1919, in which it was said:

"1. The Department has been informed that in order to prepare the necessary Executive Order to effect the transfer of the San Geronimo Reservation desired for Naval uses, and now under the jurisdiction of the War Department, it will be necessary to furnish a description of the land involved by metes and bounds as determined by an accurate survey referred to existing and well-recognized monuments. The description contained in reference (a) is not sufficiently accurate upon which to base an Executive Order.

"2. Kindly furnish this information."

On October 8th, following, the defendant answered:

"1. In accordance with reference (a) the following description of the San Geronimo Reservation is furnished:

'Beginning at monument No. 84 on the Military Road as shown on the Military Chart of the Military Reservation of San Juan, Porto Rico, and extending N. 23°-29' E. 633 ft. to

Monument No. 83, thence continuing N.  $23^{\circ}$ -29' E. 397 ft. to the sea to point No. 89, thence easterly along the sea to point No. 90 on the rocks in front of old fort San Geronimo, thence S.  $38^{\circ}$ -29' W. 1,240 feet to point No. 91 on the corner of Old Fort San Antonio, thence S.  $66^{\circ}$ -29' W. 337 ft. to  
112 point No. 92 on the northern abutment of the railroad bridge, thence N.  $77^{\circ}$ -05' W. 676.5 ft. to point No. 93 on the Bulkhead Line of San Antonio channel, thence 962.5 ft. N.  $23^{\circ}$ -29' E. to Monument No. 84, the point of beginning'

"2. The above distances and bearings were obtained by a survey, made October 6, 1919, by myself and a surveyor from the U. S. Army Engineer's Office at this place. The points Nos. 83 and 84 are plainly and permanently marked by concrete monuments and are shown on the Army chart of the Military Reservation of San Juan, Porto Rico. Suitable marks or monuments will be installed on the reservation at the new points established.

"3. Blueprints of the San Geronimo Reservation, showing all the points of this survey are in process of preparation and will be forwarded as soon as completed. However, the objects on which the new points of the survey were established are all shown on the Army chart of the San Juan Military Reservation, so that the new points, and the entire boundary lines, can be plotted from the description given in the 1st paragraph.

"4. It is requested that the formal complete transfer mentioned in the reference (b), be expedited as much as possible."

And this last description, which altered substantially the eastern boundary of the reservation by including within it a large part of the Laguna, was what served as a basis for the contract of July 15, 1921.

With it the defendant secured five and twenty-seven hundredths (5.27) acres more, according to the testimony of witness Murden for the plaintiff, and five and eight hundred sixty-four thousandths (5.864) acres, according to the testimony of witness Hoar for the defendant.

It is unquestionable that, according to the laws of Congress and Proclamations of the President, those lands were put under the control of the People of Porto Rico

and as the People of Porto Rico were deprived of them in such manner, its interest is clear.

The acts of the defendant were direct and decisive. During the trial he tried to evade responsibility by placing it entirely on the "surveyor from the U. S. Army Engineer's Office at this place" to whom his letter  
113 refers, but his letter shows what his participation was and does not contain any explanation for such an important change.

When, at the end of the trial, the representative of the People of Porto Rico qualified as a "grasping fraud" the acts of the defendant in this respect, it seemed to me exaggerated, perhaps passionate, too strong by all means. Nevertheless, after analyzing for months coolly the evidence and the conduct of the defendant as shown by it, I am convinced that that qualification is right, especially when I remember the effect produced on the defendant by the testimony of Angel W. Fernandez. This witness was one of those introduced by the complainant to prove the value of the lands involved in this suit. He had been examined directly and later was subject to a detailed cross-examination by the attorney for the defendant, in which, among other things, emphasis had been given to the existence of hills, dunes and old fortifications on the lands at San Geronimo which tended to prove that they depreciated greatly the value of the lands. At the end of this cross-examination the countenance of the defendant who was present, as he had been with very short absences during all the trial, seemed satisfied. Immediately the attorney for the complainant asked in his redirect examination the following question and received the following reply from the witness:

"Q. If there were any lands to be filled in or near the Baker lease, owned by the defendant, would the sand dunes on his property be an asset or a liability? In other words, would they increase the value of the property as a whole or decrease it? A. It seems to me that there would be a good source there of material to make the filling."

An attitude of attentive observation first and of evident contrariness later was reflected in such a manner on the



face of the defendant that it strongly called my attention.

And it is because the question and the answer gave  
114 the key to the *opportunity* of which the defendant  
took advantage. The lagoon is very shallow in the  
part that was taken. The record shows its depth. Actu-  
ally, it is not proper as a place for construction, but when  
filled its situation would make it excellent. And thus, what  
was useless very near could be removed and utilized in  
such a manner that instead of an expenditure it would  
result in a benefit.

A certain transaction begun between the defendant and  
the Attorney General of Porto Rico is insistently considered  
by the defendant as definite and that it eliminates the Peo-  
ple of Porto Rico from the suit. In my judgment it is not  
so. The defendant could obtain nothing definite without  
the intervention of the United States. The People could  
obtain nothing final without such intervention. And ex-  
amining the evidence adduced, it is concluded that nothing  
definite was reached by the Attorney General of Porto Rico.

In his answer the defendant insisted upon several ques-  
tions which were studied and determined, as we said at the  
beginning, by our order and opinion of November 20, 1925.  
Our judgment is the same now, and to it we adhere, includ-  
ing that as a part of this opinion.

Only some of the improvements that the defendant prom-  
ised to make have been done. The most important, the  
construction of the house, has not been made. Any expense  
the defendant may have incurred is more than compensated  
by the rent that he has not had to pay while living for years  
in the old house of the fort.

The fact of the obtention by the defendant of the exten-  
sion of waiver of rights on the part of the Loiza Sugar Com-  
pany, in the form revealed by the record, cannot in-  
115 duce the Court to reach a different conclusion.

The defenses of the defendant are unfounded,  
therefore, according to the facts and the law.

Notwithstanding the great length of this opinion, we ob-  
serve that we have said nothing regarding the evidence that  
shows that the defendant, when he entered as a volunteer

in the Army during the Spanish-American War, or when soliciting admission into the Naval Academy, reported falsely as to his age; that he solicited and obtained, without any cost on his part, certificates from the Registrar of Property concerning the lands at Loiza, when he should have paid for them as any other private citizen, presenting himself in the Registry in such a manner as to give the impression that he was acting in his official capacity and for the benefit of the Government; that in a similar manner he obtained also for his service in connection with the San Geronimo lands the aid of prisoners in the Insular penitentiary, and of the trucks of the National Guard of Porto Rico; that he received at the same time two salaries from different departments of the same Government, and that although living at San Geronimo, he claimed rent whenever called to active service. Such evidence is not of decisive importance in this suit, but it gives a better knowledge of the defendant and permits a more certain judgment regarding the credibility of the defendant and the direct acts performed by him in order to secure the so-called contract of lease of July 15, 1921.

In revising this opinion, we realize its deficiency. We should have preferred to make a complete analysis of some of the depositions, especially of those of Captain White, Commander Hooper and Solicitor Neagle, and of the testimony of the defendant, and to have narrated the  
116 facts more fully, discussing them with more lucidity; but it is necessary to close.

If the opinion is faulty, the record, on the other hand, is complete and an examination of it can lead only to the conclusion that this extraordinary contract of lease for nearly ten centuries, the celebration of which seems somewhat impossible, must be annulled.

A decree will be drawn and entered for the complainant and for the intervener in accordance with the prayers of their bills.

Dated at San Juan, Porto Rico, this 2nd day of November, 1926.

\_\_\_\_\_,  
*Judge.*

*Fiat.*

Let this amendment be filed.

W. HITZ,  
*Justice.*

*Separate Amendment to Return to Rule and Amendment to Answer of Curtis D. Wilbur, Secretary of the Navy.*

Filed December 17, 1926.

\* \* \* \* \*

The defendant, Curtis D. Wilbur, Secretary of the Navy, by leave of Court first had and obtained, for amendment to his return to the rule and amendment to his answer to the Bill of Complaint, says:

1. Further answering paragraph Five of the Bill of Complaint, this defendant avers that the equity proceeding pending in the District Court of the United States for the District of Porto Rico against Virgil Baker, the plaintiff herein and Estella May Baker, his wife, was submitted to said Court, argued by counsel, and by an opinion filed November 2nd, 1926; copy of which opinion is attached to the amendment to the return and answer of J. Raymond McCarl, Comptroller General of the United States, the other defendant herein, the said District Court held that the 999-year lease of July 15, 1921, had been obtained by this plaintiff through deceit and fraud on the United States; that said lease was unauthorized by law; that it was without adequate consideration to the United States; and directed the entering of a decree cancelling the so-called lease. In concluding the opinion, the Court said:

“Notwithstanding the great length of this opinion, we observe that we have said nothing regarding the evidence that shows that the defendant, when he entered as a volunteer in the Army during the Spanish-American War, or when soliciting admission into the Naval Academy, reported falsely as to his age; that he solicited and obtained, without any cost on his part, certificates from the Registrar of Property concerning the lands at Loiza, when he should



have paid for them as any other private citizen, presenting himself in the Registry in such a manner as to give the impression that he was acting in his official capacity and for the benefit of the Government; that in a similar manner he obtained also for his service in connection with the San Geronimo lands the aid of prisoners in the Insular penitentiary, and of the trucks of the National Guard of Porto Rico; that he received at the same time two salaries from different departments of the same Government, and that although living at San Geronimo, he claimed rent whenever called to active service. \* \* \*

2. Further answering this defendant says that because of the deceit and fraud found by the District Court for the District of Porto Rico in its aforesaid opinion filed November 2, 1926, to have been practiced by the plaintiff on the United States in obtaining the aforesaid so-called 999-year lease of June 15, 1921, and in claiming rental allowance of \$1,383.33 when he was in fact occupying public quarters in Fort San Geronimo, and in claiming salary of \$6,357.88 as Civilian Inspector of Hulls, Department of Commerce, when he was on active duty as an officer  
 118 of the Navy, there is no equity in the bill of complaint.

CURTIS D. WILBUR,

*Secretary of the Navy.*

PEYTON GORDON,

*United States Attorney.*

LEO A. ROVER,

*Assistant United States Attorney.*

*Fiat.*

Let this amendment be filed.

W. HITZ,

*Justice*

*Stipulation.*

Filed January 3, 1927.

\* \* \* \* \*

It is now here stipulated as of Friday, December 17, 1926, that the hearings upon the return of the rule to show cause

be considered as if said cause were heard upon bill and answer, and that a final decree may be entered as a result of said hearing as though the cause were fully heard on bill and answer.

In witness whereof we have hereunto subscribed our names this 20th day of December, 1926.

PALMER, DAVIS & SCOTT,  
*Attorneys for Plaintiff.*

O. R. McGUIRE,  
*Attorney for Defendant, J. Raymond McCarl.*

119 *Certificate by the Court.*

Filed January 7, 1927.

\* \* \* \* \*

It is hereby certified that at the hearing of this cause, counsel for plaintiff objected to the filing of the amended answers and exhibits on the ground that same was only the opinion of the Court in a case of the United States versus the plaintiff, and further, that it was not supported by the entire record and decree, and that a decree in said cause would be of no force and effect in this cause, and seasonably noted an exception to the allowance of said amended answers and exhibits.

By the Court:

WILLIAM HITZ,  
*Justice.*

No objection as to form of the certificate.

O. R. McGUIRE.  
Jan. 7, 1927.

*Decree Dismissing Bill of Complaint and Denying Injunction.*

Filed January 7, 1927.

\* \* \* \* \*

This cause came on to be heard at this term on rule to show cause and separate answers of the defendants thereto and to the bill of complaint. By leave of Court first had

and obtained, the defendants filed separate amendments to their respective answers to the rule to show cause and bill of complaint. It was stipulated by counsel that the hearing on the rule to show cause be considered as if said cause was heard upon bill and answer and that a final decree be taken at this time. After hearing argument by counsel and the

Court being duly advised in the premises, it is by  
120 the Court, this 7th day of January, 1927—

Adjudged, ordered, and decreed, that the bill of complaint be, and the same is, hereby dismissed and injunction denied.

And the defendants shall have their costs to be taxed by the Clerk of the Court against the plaintiff.

By the Court:

WILLIAM HITZ,  
*Justice.*

Decree approved, as to form, this 6th day of January, 1927.

WM. J. NEALE,  
*Attorney for Plaintiff.*

Appeal noted & allowed and bond for costs fixed at \$100 or \$50 cash.

W. H.

### *Memorandum.*

January 20, 1927.—\$50 cash deposited in lieu of appeal bond.

### *Assignment of Errors.*

Filed January 20, 1927.

\* \* \* \* \*

Now comes the plaintiff, by his attorneys, and assigns the following errors committed by the Trial Court in the above entitled cause:

- (1) The Court erred in dismissing the plaintiff's bill of complaint, thereby holding in effect that the Comptroller General and the Secretary of the Navy have  
121 a right to withhold the pay of the plaintiff although



it is admitted by the answer of the Secretary of the Navy to be due him and appropriated for him by Congress and is available for payment to him as the salary of his office.

(2) The Court erred in dismissing the bill of complaint thereby in effect denying to the plaintiff his right to have the questions attempted to be litigated by the two defendants tried before a jury in a court of law.

(3) The Court erred in sustaining the contention of the defendants that the plaintiff was not in Court with clean hands for that it appears by the record that such condition, if true, had no application to the pending case.

(4) The Court erred in refusing to grant the injunction prayed by the plaintiff, thereby in effect permitting the defendants, or either of them, to withhold from the plaintiff his salary which had been duly appropriated for him.

(5) The Court erred in not granting a final injunction restraining the defendants, or either of them, from withholding the pay of the plaintiff as prayed in the bill of complaint.

(6) The Court erred in permitting the amended answer of the defendants to be filed over the objection of the plaintiff.

WM. J. NEALE,  
WM. D. HARRIS,  
*Attorneys for Plaintiff.*

Major O. R. McGuire,  
Attorney for Defendant McCarl, and  
Leo A. Rover, Esq.,  
Attorney for Defendant Wilbur:

Please take notice that we are this 20th day of January,  
1927, filing the foregoing assignment of errors in the  
122 above cause.

WM. J. NEALE,  
WM. D. HARRIS,  
*Attorneys for Plaintiff.*

*Designation of Record.*

Filed January 20, 1927.

\* \* \* \* \*

To the Clerk of the Supreme Court of the District of Columbia:

In preparing the record on appeal to the Court of Appeals in the above entitled cause, you will please include therein the following papers:

- (1) The bill of complaint and exhibits thereto attached.
- (2) The rule to show cause issued thereon, and memorandum of service thereof.
- (3) The separate answers of Defendants McCarl and Wilbur to the rule to show cause and to the bill of complaint.
- (4) The amended answers of the Defendants McCarl and Wilbur and exhibits thereto.
- (5) Certificate by the Court as to the exceptions and objection of the plaintiff to the filing of the amended answers.
- (6) Stipulation of counsel to the effect that the cause should be heard as upon final hearing upon bill and answer.
- (7) The final decree dismissing the bill of complaint and the memorandum attached thereto noting an appeal in open Court and providing for appeal bond or deposit in cash in lieu thereof.
- (8) This designation of record.

WM. J. NEALE,  
WM. D. HARRIS,  
*Attorneys for Plaintiff.*

123 Major O. R. McGuire,  
Attorney for Defendant McCarl, and  
Leo A. Rover, Esq.,  
Attorney for Defendant Wilbur:

Please take notice that we are this 20th day of January, 1927, filing with the Clerk of the Supreme Court of the District of Columbia the foregoing designation of record.

WM. J. NEALE,  
WM. D. HARRIS,  
*Attorneys for Plaintiff.*

Notice received this 20th day of January 1927.

O. R. McGUIRE,  
LEO A. ROVER.

124 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 123, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45554 in Equity, wherein Virgil Baker is Plaintiff and J. Raymond McCarl, Comptroller General of the United States and Curtis D. Wilbur, Secretary of the Navy, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 25th day of April, 1927.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,  
*Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 4596. Virgil Baker, appellant, vs. J. Raymond McCarl, Comptroller General of the United States, et al. Court of Appeals, District of Columbia. Filed Apr. 30, 1927. Henry W. Hodges, Clerk.

(5893)





COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

AUG 20 1927

# COURT OF APPEALS

OF THE DISTRICT OF COLUMBIA,

APRIL TERM, 1927.

\_\_\_\_\_  
No. 4596.  
\_\_\_\_\_

VIRGIL BAKER,

*Appellant,*

VS.

J. RAYMOND McCARL, *Comptroller General of the  
United States, and* CURTIS D. WILBUR, *Secretary  
of the Navy.*

\_\_\_\_\_  
**BRIEF ON BEHALF OF APPELLANT.**  
\_\_\_\_\_

SEIFORDE M. STELLWAGEN,  
WILLIAM D. HARRIS,  
WILLIAM J. NEALE,  
Attorneys for Appellant.

PALMER, DAVIS & SCOTT,  
Of Counsel.

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# Court of Appeals

OF THE DISTRICT OF COLUMBIA,

APRIL TERM, 1927.

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No. 4596.

---

VIRGIL BAKER,

*Appellant,*

VS.

J. RAYMOND McCARL, *Comptroller General  
of the United States, and* CURTIS D.  
WILBUR, *Secretary of the Navy.*

---

## **BRIEF ON BEHALF OF APPELLANT.**

---

### *Statement of Case.*

This is another Naval pay case wherein the salary of a Naval Officer has been held up by reason of a ruling of the Comptroller General.

The fundamental facts and principles in the case are shown by the appellant's bill, Record 11 *et seq.*, the answer of the defendant McCarl, Record 16, *et seq.*, and the answer of the defendant Wilbur, Record 37, *et seq.*

It appears by and from the bill of complaint that the appellant was a Naval Officer who finally reached the rank and grade of Lieutenant Commander, United States Navy, retired, and



was on the payrolls of the Navy Department as such officer, being regularly paid his salary and allowance up until the 6th day of March, 1926, when his pay was withheld because of the decision of the Comptroller General, which appears by reference to "Exhibit C" of the bill of complaint, Record, page 15.

It further appears from the bill, paragraph 5, Record page 4, that the appellant was living upon premises known as Fort San Geronimo on the Island of Porto Rico, which he had leased from the United States Government through the Navy Department for a period of 999 years, and that he had come into the possession of these premises under a lease claimed by appellant to be valid and executed under express provisions of an Act of Congress. There being no Government quarters available at his station when on active duty, he was allowed the ordinary commutation of quarters or rental allowance on the theory that he was living upon his own premises, which commutation had been fully paid to him.

It further appears from the same paragraph and succeeding paragraphs of the bill that the United States Government, through the Department of Justice, had attacked the validity of appellant's lease in an equity suit at the time of the filing of this bill pending in the District Court of the United States for the District of Porto Rico; that the defendant McCarl undertook to adjudicate the validity of this lease and held it to be void whereupon he set up a charge on his books against the appellant for the sum of \$1,383.33 as representing improper payment to the appellant for commutation of quarters

upon the theory that the lease was void, and therefore, that the appellant was living on Government property.

It further appears from paragraph 7 of the bill, Record page 5, that during certain periods of time when appellant was occupying an inactive status, he was appointed to the position of Inspector of Hulls, Steamboat Inspection Service, Department of Commerce, at San Juan, Porto Rico, and paid a salary therefor. It further appears from the same paragraph of the bill that some question apparently was raised as to the validity of his double salary during a period when he was temporarily restored to active duty. The Comptroller General held that he could not receive both his salary as Lieutenant Commander and his salary as Steamboat Inspector upon the theory that this double salary was in violation of the Act of July 31, 1894 (28 Stat. 205) U. S. Comp. Stat. §3231, ignoring however, the Act of May 31, 1924 (43 Stat. 245) U. S. Comp. Stat. Sup. No. 5, 1924, §3231, which had been enacted to relieve retired officers temporarily restored to active duty from the rigor of the former Act.

Appellant alleges in his bill that by virtue of the Act of May 31, 1924, the Act of 1894 had been amended so as to validate this payment of double salary, the amendment of May 31, 1924, being set out at page 5 and the top of page 6 of the Record. Notwithstanding this amendment, the Comptroller General as aforesaid, by his opinion set out at pages 12, 13 and 14 of the Record, held that this amendment did not apply, and that the appellant was not entitled to the double salary, and set up a charge against him of \$6,367.88.

Upon the strength of this opinion and the opinion of the Comptroller set out at page 11 of the Record, the Disbursing Officer of the Navy has withheld the pay of the appellant, as shown by "Exhibit C" to the bill of complaint, Record page 15 .

The answer of the defendant McCarl beginning at page 16 of the Record is apparently the stock form of answer which he has filed in the two cases heretofore considered by this Court, namely, *McCarl v. Cox*, 56 Appeals D. C. 27, 8 Fed. (2d) 669; 53 Wash. Law Rep. 758; and *McCarl, et al v. Pence*, 55 Wash. Law Rep. 414.

The answer of the defendant Wilbur, set out on page 37 of the Record, admits the status of the appellant, the fact that he has regularly drawn his pay until the stop order of March 6, 1926. It expressly admits that—

"Congress has appropriated funds covering his pay and allowances and that the money for the payment thereof has been actually available and has been turned over and is now in the possession of Thomas Cochran, a Disbursing Officer of the Navy, but he avers that Congress has made no specific appropriation for the payment of the pay and allowances of the plaintiff." (R. pp. 37-38).

The answer also admits that Cochran is a subordinate of the defendant Wilbur and subject to his orders, commands and instructions.

The facts may be briefly stated as follows: That the appellant is a duly appointed and commissioned officer (retired) of the Navy, that his salary has been appropriated and is in the hands of subordinates to the Secretary of the Navy,



but that payment has been withheld because the Comptroller General has ruled that appellant has unlawfully received commutation and quarters, and that he has unlawfully received pay from two Departments of the Government. Appellant denies that he has received unlawful pay or allowance in either case.

As shown by the answer of the Secretary of the Navy heretofore quoted, it is apparent that the opinion of the Comptroller General is the only thing which is causing the withholding of the pay of appellant.

This proceeding came on for hearing in the Court below in the following manner: Upon the filing of the bill of complaint, a rule was issued against both defendants directing them to show cause why they should not be restrained and enjoined from withholding the pay as was done in the *Cox* case and the *Pence* case, *supra*. Both defendants answered the rule and bill, and, although it does not appear by the Record itself, there was an argument upon the return to the rule before the Chief Justice of the Court below on the last day of the June Term, 1926. Through some inadvertence of the Clerk, the papers were not handed to the Chief Justice and upon the beginning of the October term, not having considered the matter, the case was ordered upon calendar for hearing in regular course at the October term, and came on for hearing before Mr. Justice Hitz, on December 17, 1926, at which time the defendants offered to amend their answers to the bill of complaint by setting out that in the suit in Porto Rico to set aside the lease from the United States to Baker, the Judge before whom same was heard had filed his opinion

and attaching a copy of the opinion to the amended answer, Record pages 54-56, *et seq.*

At the time this offer was made, as will be seen by the certificate of the Trial Judge, Record page 117, the appellant seasonably objected to the filing of the amended answer, and the exhibit upon the grounds stated in said certificate. Subsequent to the final hearing on this occasion, a stipulation was filed on January 3, 1927, as of December 17th, by which it was agreed that the hearing on December 17th should be considered as if the case were heard upon bill and answer (Record pp. 116-117). After this hearing and namely, on January 7th (Record pp. 117-118), the Court below passed a decree dismissing the appellant's bill without any opinion whatever, and without any statement whatsoever as to the reasons for making such order.

## ARGUMENT.

### I.

*This Case is Governed by McCarl v. Cox, 56 Appeals D. C. 27, and McCarl v. Pence, 55 Wash. Law Rep. 414. Decided By This Court.*

Upon the foregoing statement of facts, it is clear that the same fundamental questions are involved in this case as in *McCarl v. Cox*, 56 Appeals, D. C. 27; 8 Fed. (2d) 669; 53 Wash. Law Rep. 58, and *McCarl, et al, v. Pence*, 55 Wash. Law Rep. 414, namely, the right of the defendants to withhold the pay due to appellant because the Comptroller General has set up a charge against the appellant for a prior debt, although it is admitted that the subsequent

salary has been appropriated and is held by the Disbursing Officer (R. pp. 37-38). The Record affirmatively shows that no suit has been brought against appellant to recover back this money.

If the lease made to appellant for the Porto Rican property was void, and if he was not entitled to his pay as Steamboat Inspector, then under the authority of the *Cox* and *Pence* cases, *supra*, it would be incumbent upon the Governmentment to file a suit at law where the facts could be determined by a jury. This admittedly has not been done.

By the answers of both defendants, however, it is apparent that they are attempting, as was attempted in the *Cox* and *Pence* cases, *supra*, to have this Court, in a proceeding to which the United States is not a party, <sup>to</sup> determine the liability of the ~~defendants~~ <sup>appellant</sup> to the Government. We take it that these points have been definitely and finally settled in the *Cox* and *Pence* cases, *supra*, as well as the other cases upon which they were predicated. This being so, appellant's liability to the United States, even granting for the sake of argument, the soundness of the opinion of the Court in Porto Rico and the opinion of the Comptroller General as to the liability on the double pay question and the applicability of the Act of May 31, 1924, these questions can not be determined in this litigation but can only be determined in proper action brought by the United States against the defendants. Both the *Cox* and *Pence* cases confirm the established principle that the salary of an office is an incident to the office, and the officer showing title to the office is *ipso facto* entitled to the salary.



And only by removal or by constitutional legislation can the salary be stopped or altered. That the Comptroller General has such power, granting a debt owed by the officer, is absurd.

## II.

*The Court Below Erred in Permitting the  
Amendment to the Answer Setting  
Out the Opinion of the Judge  
in the Porto Rican Case.*

It will be observed from page 117 of the Record that objection was made to the amendment to the answer on the ground that there was offered as an exhibit only the opinion of the Court which was unsupported by the entire Record or the Decree, and upon the further ground that even had there been a decree at that time, it would have been an improper answer in this proceeding.

It does not seem necessary to argue at length that the foregoing amendment was erroneously allowed and considered. The pending of a cause in another Court works no estoppel on this Court. The opinion of the judge in Porto Rico is not a binding part of the procedure in that Court and would be looked to on appeal only as expression of opinion and not a substantial part of the record. Even if a decree in equity in a Porto Rican Court were offered, it is doubtful if such decree would be protected by the "full faith and credit" clause so as to give it extraterritorial effect. But if so, the suit in Porto Rico only affects the title to the land and no debt has been adjudicated.

Furthermore, the suit there is between different parties, which in itself, would prevent its being an answer by these defendants to justify their illegal acts.

This amendment is but another example of circuitous reasoning. If the Porto Rican judge finds that Baker's title to the Porto Rican property is defective and decrees that title should revert to the United States, then Baker obtained commutation of quarters without right or consideration, then on the principle of unjust enrichment, he would be compelled (if litigated) to return the money, which in turn would be a debt owing the United States.

And if all this reasoning be true, the answer remains, that by virtue of the *Cox* and *Pence* cases, neither of the defendants have any right to interfere with the payment of a lawful salary, duly appropriated by Congress.

The allowance of the amendment was, therefore, error.

### III.

#### *Appellant Comes Into Court With Clean Hands.*

One other question was argued at the Bar of the Court below, but as suggested, that Court has left us confused with respect to its reasons for dismissing the bill. Based upon the statement made in the opinion of the Trial Judge in the Porto Rican case, it was argued that this appellant had not come into a court of equity with clean hands. Bearing in mind that the question here is the right of the Secretary of the Navy and the Comptroller General to with-

hold the salary duly appropriated by Congress of an officer, and bearing in mind also that the only question in the Porto Rican case was, whether or not a lease had been unlawfully and fraudulently obtained from the United States Government, it is very clear that the above maxim, to-wit: "He who comes into a Court of equity must come with clean hands" is not applicable.

Before discussing the authorities, we might suggest that although this maxim was not specifically referred to in the *Cox* and *Pence* cases, *supra*, nevertheless, it is apparent that if this doctrine could apply to such cases as this, it would have been applied to those cases, because the facts set up by way of defense would, if true, have amounted to perjury upon the part of plaintiffs in those cases. Because of the silence of the Court below, we must assume that the Court applied this maxim or else that the Court intentionally overruled the judgment of this Court in both the *Cox* and *Pence* cases, *supra*, and we can not attribute to that Court such a motive. The "clean hands" doctrine is stated thus in 21 C. J. 187, Sec. 173.

"The misconduct which falls within this maxim must have infected the *cause of action*, so that to entertain it would be violative of conscience. It must relate *directly* to the *very* transaction concerning which complaint is made, and not merely to the general morals or conduct of the person seeking relief. A party is not barred from relief because of misconduct *not connected* with the matter in controversy; and this is true, although the misconduct *may be directly connected with the subject matter of the suit.*" (Italics ours).



In support of this statement of the law, the text cites *American Sugar Refining Co. v. McFarland*, 229 Fed. 284, affirmed 241 U. S. 79; 60 L. E. 899, and numerous other United States cases. It also cites *Roote v. Roote*, 33 App. D. C. 398; 23 L. R. A. N. S. 240, and *Mercantile Trust Co v. Hensey*, 21 App. D. C.; 31 W. L. R. 96. This Court, in *Roote v. Roote*, *supra*, stated the doctrine as follows:

“The rule that when a litigant comes into a court of equity, he must come with clean hands, refers only to the matter to be litigated and no other. *Viertel v. Viertel*, 99 Mo. App. 710. The matter here to be litigated is the right of complainant to a divorce, by reasons of defendant’s refusal to join him, when afforded an opportunity, and her subsequent adulterous acts. There is nothing shown in the conduct of complainant during this period to estop him from maintaining this action.”

So in this case the only question here to be litigated is the right of the defendants to withhold from appellant salary which has been appropriated for him by Congress. Whether previously he had received unlawfully a double salary or whether he procured unlawfully and fraudulently a lease to Government property in no way relates to or affects the right here litigated, namely, as above stated, his right to the salary of his office, or conversely, the right of defendants to withhold money appropriated for him by Congress.

It may well be that in any suit instituted by appellant undertaking to enforce either his

rights to double pay or his rights under the lease that the doctrine might possibly, upon appropriate proof, be brought into force but that is not the case here. We are litigating an entirely different unrelated transaction or right—that of his right to the salary incident to his office.

In *American Sugar Refining Co. v. McFarland, et al*, 229 Fed. 284, the Court at the bottom of page 287 and top of page 288, states the rule as follows:

The wrong of a plaintiff which may be invoked to defeat his claim to equitable relief must have an *immediate* and *necessary relation* to the equity for the enforcement of which he prays. *Talbot v. Independent Order of Owls*, 220 Fed. 660, 136 C. C. A. 268” (Italics ours).

The *American Sugar Refining* case just quoted was affirmed by the Supreme Court of the United States on constitutional grounds and is reported in 241 U. S. 79; 60 L. E. 899. The only reference made in the opinion of that Court to the doctrine here under consideration is the language of Mr. Justice Holmes at the bottom of page 904, 60 L. E.:

“We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff’s wickedness in the answer deprive it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way.”

The application of this maxim is stated in *Talbot v. Independent Order of Owls*, 220 Fed.

660, by Sanborn, Circuit Judge, at page 662, as follows:

“That principle does not repel all sinners from the precincts of courts of equity, nor does it disqualify any plaintiff from obtaining full relief there who has not done iniquity *in the very transaction* concerning which *he complains*. The wrong which may be invoked to defeat him *must have an immediate and necessary relation* to the equity for the enforcement of which he prays.” (Italics ours).

Numerous cases are cited by the learned Judge in support of this statement.

If the learned Trial Judge did not base his reason for dismissing the case upon the above suggested maxim, it seems to us he could only have determined it upon the other co-related maxim, namely—“He who seeks equity must do equity.”

This maxim has been fully determined by this Court in a very able opinion by the late Chief Justice Alvey. In *Mercantile Trust Co., et al, v. Hensey, et al*, 21 D. C. Apps. 38; 31 W. L. R. 96, in treating of the application of the above maxim, Mr. Justice Alvey quoted with approval from Pomeroy, in his work on Equity Jurisprudence, Vol. 1, Sec. 386, saying:

“\* \* \* (3) Finally, the principle will not apply so as to compel the plaintiff to do equity when the relief sought by the plaintiff and the equitable right or relief secured or awarded to the defendant belong to or grow out of two entirely separate and distinct matters.”



Continuing, the Chief Justice says:

“\* \* \* and while the rule is variously stated in the several decisions referred to, they all maintain substantially the same general principle. Among the cases cited is that of *Malone v. Bostwick*, 96 Cal. 53; and without stating the facts of that case, the principle that was applied is thus briefly but clearly stated in the opinion of the Court.

‘It is agreed, however, that as the plaintiff is here seeking the aid of a court of equity, he should be compelled to do equity, but the maxim of equity jurisprudence only applies where the relief sought by the plaintiff and the right demanded by the defendant belong to or grow out of the same transaction. *It has no application* where the demand of the defendant is based upon a contract separate and distinct from that which forms the subject of the plaintiff’s action.’ And this is the principle maintained by all the well-considered cases.” (Italics ours).

It therefore appears that both of the above suggested maxims have been fully considered and determined by this Court to be applicable only to those cases wherein the maxims must be applied directly to the transaction to be litigated. This being so, neither maxim can be applicable to the case we are now considering for the reason that we are litigating solely the right of the two defendants to withhold or cause to be withheld from appellant his pay which has been appropriated for him by Congress. And the question as to his obtaining a fraudulent lease or receiving double pay from the Government is not such a relation to the subject matter being litigated as to bring the case within the rules laid

down in the authorities just quoted. It is therefore submitted that if the Court below acted under the above suggested maxims, it committed error.

#### IV.

#### *Courts Can Only Litigate Questions Between Parties to the Suit.*

In the separate answer of J. R. McCarl, the Court below was requested, or perhaps commanded, that if it took jurisdiction of the bill, (R. p. 23, Par. 9) "then of necessity, equity, and good conscience, the Court must determine the claim of the United States against plaintiff \* \* \* and \* \* \* provide in its decree for payment by plaintiff into the United States Treasury of said sums of \$1,383.33 and \$6,367.88."

Plagarizing the words of counsel for appellee in arguing the *Pence* case before this Court, "This contention marks an artless simplicity that opposing argument might mar."

Assuming the risk of marring the foregoing pleading, we feel certain that as a principle of law, it is firmly established that no Court can enter a judgment or decree for or against a person, not a party to the record.

#### V.

#### *Appellant Should Have Personal Judgment for Costs.*

One point further remains to be discussed. It appears from this Record, "Exhibit C," (R. p. 15,) and the answer of defendant Wilbur, (paragraph 8, R. pp.40-41), that this appellant has been denied his salary since March 6, 1926. In

addition to that, he has been put to the cost and expense of this litigation.

It will be observed from the Record, that from page 56 thereof to and including page 114 it is taken up entirely by the opinion of the Judge at Porto Rico, which as above pointed out, has no part in the consideration of this case other than to add to the expense of the cost of this proceeding. In view of the fact that this Court has the right to make an appropriate award of costs, the appellant urges not only that the judgment of the Court below be reversed, but that this Court specifically direct that the costs in this proceeding be taxed against the defendant McCarl to the end that when the matter of costs comes up in the Court below in the final decree, there can be no question as to liability therefor. This matter being properly before the Court, we think that it should be now here determined.

*Conclusion.*

In consideration of what has been said in this brief, we most earnestly submit that the judgment of the Court below should be reversed with directions to grant the relief prayed for and that this appellant may have a decree for his costs.

Respectfully submitted,

SEIFORDE M. STELLWAGEN,  
WILLIAM D. HARRIS,  
WILLIAM J. NEALE,  
Attorneys for Appellant.

PALMER, DAVIS & SCOTT,  
Of Counsel.







COURT OF APPEALS  
DISTRICT OF COLUMBIA  
FILED

SEP 21 1927

*Henry H. Hodges*  
No. 4596 *Black*

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In the Court of Appeals of the District of  
Columbia

APRIL TERM, 1927

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VIRGIL BAKER, LIEUTENANT COMMANDER, U. S.  
NAVY, RETIRED, APPELLANT

v.

J. RAYMOND MCCARL, COMPTROLLER GENERAL OF  
THE UNITED STATES, AND CURTIS D. WILBUR, SEC-  
RETARY OF THE NAVY, APPELLEES

---

BRIEF FOR APPELLEES

---

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*United States Attorney.*

LEO A. ROVER,  
*Assistant United States Attorney.*

R. L. GOLZÉ,  
O. E. MCGUIRE,  
*Attorneys for Appellees.*

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# In the Court of Appeals of the District of Columbia

APRIL TERM, 1927

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No. 4596

VIRGIL BAKER, LIEUTENANT COMMANDER, U. S.  
Navy, Retired, appellant

v.

J. RAYMOND MCCARL, COMPTROLLER GENERAL OF  
the United States, and Curtis D. Wilbur, Secre-  
tary of the Navy, appellees

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## BRIEF FOR APPELLEES

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### STATEMENT OF THE CASE

The statement of the case prepared by counsel for appellant is both incorrect and incomplete. It is incorrect when the court is informed that this is "another naval pay case." As is admitted in the first paragraph of the bill of complaint, appellant is a retired officer and not an officer on the active list to which the cases concerned related. The distinction is important—under the law he performs no official duties while in a retired status. Obviously the argument *ab inconvenienti* of the Court in the *Cox case*, 8 Fed. (2nd) 669, against the with-

holding of sums from the pay of officers on the active list of the Navy on account of indebtedness to the United States does not apply here, for appellant, as a retired officer on inactive duty, is not "required to go to the far ends of the earth" depending upon the salary attached to his office for the support of his family "left behind." Therefore the case is not "another naval pay case."

The statement is incomplete in that the facts recited are those alleged in the bill of complaint with a mere passing reference to the allegations contained in the answers of the appellees. The allegations of appellees are most important and constituted the basis of the decree entered by the trial justice dismissing the bill of complaint and differentiating this case from the *Cox case, supra*, and the *Pence case*, 18 Fed. (2nd) 809. *As the case was submitted on bill and answer without any evidence having been introduced to disprove the allegations of the answers, these allegations, where inconsistent with the bill of complaint, must be taken as true and are for consideration in any proper disposition of this appeal.*

The case must be understood on the record as one addressing itself to the conscience of a chancellor, and we are justified in concluding from the action taken that the facts were so striking as to move the conscience of the chancellor accordingly and require no decision. Under such circumstances an appellate court will be slow to reverse.

In substance, it is alleged in the answers and admitted by the state of the record that appellant perpetrated a fraud on the United States in obtaining the sums charged against him in his account, leaving a debit balance due the United States. The facts constituting such fraudulent action are set out in paragraphs 5 to 8, inclusive, of the answer of appellee McCarl (R. 19, 22) and exhibits referred to therein and in paragraph 5 of the answer of appellee Wilbur (R. 38, 40). Such fraud was proven in the United States District Court for the District of Porto Rico to have been perpetrated on the United States, as is shown by a copy of the opinion of said court attached as an exhibit to the supplemental answers of the appellees filed with leave of court. (R. 54, 55, and 115 and 116.) The pages of the record intervening between 55 and 115 are taken up with a copy of the opinion of the United States District Court directing the entry of a decree awarding the United States the relief prayed.

The fraud consisted in obtaining from the Secretary of the Navy a lease, dated July 15, 1921, for 999 years, of a tract of public land at San Juan, Porto Rico, on a promise, among others, stated in appellee's letter of December 3, 1919 (R. 24, 25), that—

5. I would agree to waive commutation of quarters while occupying the property, and in time of war to place at the disposal of the Department, free of cost, the entire prop-



erty, and all improvements thereon, including the residence.

Similar promises have been made by appellant to the Navy Department in obtaining leases on the land for short prior periods (R. 27, 28, par. 3), and during the time this prior lease was in existence appellant neither claimed nor received allowances for quarters (R. 20, 39). However, as soon as appellant secured the 999-year lease, he began to claim, and disbursing officers illegally paid him, allowances aggregating \$1,383.33 for rental of quarters, when he, in fact, occupied Government quarters in Fort San Geronimo on the leased premises. After concluding that the lease of 1921 was invalid and should be cancelled, the United States District Court concluded in its opinion (R. 113, 114) that—

Notwithstanding the great length of this opinion, we observe that we have said nothing regarding the evidence that shows that the defendant, when he entered as a volunteer in the Army during the Spanish-American War, or when soliciting admission into the Naval Academy, reported falsely as to his age; that he solicited and obtained, without any cost on his part, certificates from the Registrar of Property concerning the lands at Loiza, when he should have paid for them as any other private citizen, presenting himself in the Registry in such a manner as to give the impression that he was acting in his official capacity and for the benefit of the Government; that in a similar manner he obtained also for his service in connection

with the San Geronimo lands the aid of prisoners in the Insular penitentiary, and of the trucks of the National Guard of Porto Rico; that he received at the same time two salaries from different departments of the same Government; and that, although living at San Geronimo, he claimed rent whenever called to active service. \* \* \*

The obtaining commutation of quarters as occupying his own premises was the fruit of the wrongful action—the lease the means by which it was made possible. Appellant can not benefit by his own wrong.

The facts with respect to the item of \$6,367.88 are averred in paragraph 7 of appellee McCarl's answer and are stated in his decision of March 20, 1926 (R. 29, 35), where the matter was fully considered. In substance, appellant continued to hold the civilian position of Inspector of Hulls under the Department of Commerce, to which he had been appointed after his retirement and when on an inactive status, before his orders to active duty. In other words, appellant drew the salary of both a Navy officer on active duty and of an inspector of hulls. This was in violation of section 2 of the act of July 31, 1894, 28 Stat. 205, and the rule of incompatibility of offices. The act of May 31, 1924, 43 Stat. 245, did not apply to a retired officer on active duty as appellant was during the period the payments were obtained. While it is not so averred in the answers, it is a fact that neither the Navy Department nor the Department of Com-

merce was officially cognizant of this situation after appellant's recall to active duty during the World War.

While it may not be material, the attention of the Court is invited to pages 11 to 14, inclusive, and pages 29 to 37, inclusive, of the record which show that the claims were thoroughly considered and reconsidered by the appellee McCarl, and it is a fact that appellant appeared by present counsel when the reconsidered decision of March 20, 1926, was written.

However, counsel for appellant took the position in the court below, and they apparently take the same position here, that admitting appellant overreached the United States, as set out in the opinion of the United States District Court, in obtaining the lease of July 15, 1921; that he violated his promise of December 3, 1919, to not claim rental allowance when on active duty if given the lease; that he resided in Fort San Geronimo, in Government quarters, when he received the rental allowances on his certificate as senior Navy officer present, that public quarters were not available; and that he claimed and received two salaries from different departments of the United States, in violation of law, he is nevertheless entitled to invoke the equity powers of the courts of that same Government whose trust he has been found to have violated in order to force two officers of that Government to pay him his accruing retired pay, when there is no balance due him because of his act in securing



the credit of items in his account with the United States to which he is not entitled.

We believe, as did the court below, that such is not the law.

## ARGUMENT

### I

#### **Appellant is not in equity with clean hands**

The opinion of the United States District Court of Porto Rico (R. 56-115) discloses practices on the part of appellant, for which said court directed cancellation of the lease of July 15, 1921, resembling in many respects the practices recently considered in another famous case wherein the lease was cancelled, namely, *Pan Petroleum and Transport Company et al. v. United States*, No. 305, decided February 28, 1927, by the Supreme Court of the United States. Not only was the lease in the latter case cancelled because of fraud on the United States but the lessee was denied recovery of the sums expended by it for the benefit of the United States. Here appellant is claiming further sums from the public Treasury. The claim must be based on the contention that the lease gave rights. If the lease was unlawful, claims based on the status created thereby can not be sustained.

Counsel for appellants being bound by the answers of appellees and the opinion of the United States District Court, attempt to escape the principle declared in the *Pan Petroleum case*, and the indisputable Maxim of Equity that a plaintiff may

not come into Equity with unclean hands for relief by the contentions: (1) that appellant has not done iniquity in the transaction concerning which he now complains; and (2) that whatever iniquity he has done affects the United States and not appellees and that the appellees can not invoke the Maxim here.

As to the first contention: We do not dispute the correctness of the rule that the iniquity of a complainant, as stated by this court in *Mercantile Trust Company et al. v. Hensey*, 21 App. D. C. 38, must "belong to or grow out of the same transaction." There should be read in connection with counsels' citation from 21 C. J. (brief, p. 10) preceding paragraph 163, pages 181, 182, as follows:

The maxim that he who comes into equity must come with clean hands, or, as it is frequently expressed, that he who has done iniquity shall not have equity, or that he who has done inequity, or has not done equity, can not have equity, is of ancient origin and broad application. It is the expression of the elementary and fundamental conception of equity jurisprudence; and, although not the source of any distinctive doctrine, it furnishes a most important and universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights. This maxim expresses rather a principle of inaction than one of action. It means that equity refuses to lend its aid in any manner to one seeking its active interposition, who has been guilty of



unlawful or inequitable conduct in the matter with relation to which he seeks relief.

We disagree with counsels' application of the rule to the facts of this controversy. The promise of appellant of December 3, 1919, to abstain from claiming rental allowances when on active duty in event he was awarded the lease of July 15, 1921, is in almost identical terms with his prior promise to obtain the prior leases for shorter periods of time, and all of the leases are equally silent as to a stipulation to that effect therein. And under the prior lease he neither claimed nor received rental allowance while in his bill he claims that he was entitled under the lease to the disallowances which he obtained notwithstanding his promise not to claim them. His right is denied in the answers. If the appellees are correct in their contention (and in view of the uncontradicted averments of the answers it must be held for the purpose of this case that they are correct), the debits exceed the credits and there is no balance due him to be paid. In any event, the account is entire whether of debits or credits or both, for as said in *United States v. Burchard*, 125 U. S. 180, the account of a retired Navy officer is—

\* \* \* never been closed, and was always open to adjustment. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards. His pay was fixed by law, and the disbursing officers of the depart-

ment had no authority to allow him any more. If they did, it was in violation of the law, and he has no right to keep what he thus obtained. \* \* \*

The violated promise not to claim the allowances in event he was given the lease, and his conduct in obtaining both the lease and the allowances, have as much relation to his rights to further sums from the United States as did the loan of \$100,000 in the *Tea Pot Dome* case, though made for a different purpose; and if, as held by the court, the loan vitally affected that lease and all connected therewith, including the expenditures for the storage tanks, it must also be held that appellant's conduct and his violated promise not only affected the lease—as has been determined—but has affected appellant's money account with the United States to the extent of preventing his resort to a Court of Equity to secure further payments, notwithstanding the transaction. That is to say, the iniquity here is more nearly involved in appellant's claimed right to retired pay than was the iniquity which prevented the complainants from invoking the equity powers of the court in *Weeghman et al. v. Killefer* (C. C. A.), 215 Fed. 289, L. R. A. 1915, B-820, to prevent a baseball player which they had inequitably enticed away from another ball club from violating his agreement to play with some other club.

The iniquity is even greater than in the *Killefer* case, for appellant was the senior Navy officer on duty in San Juan. The United States and his senior

officers in the Navy Department were entitled to rely on his entire good faith. The United States District Court found, and so stated in its opinion, that appellant deliberately misled his superior officers in the Navy. More than this, it was appellant's duty as senior naval officer on the post to determine and certify whether public quarters were available for the occupancy of each Navy officer on the post, including himself. He certified that quarters were not available for the occupancy of himself and his family and obtained these allowances under section 6 of the act of June 10, 1922, 42 Stat. 628, when as found by the aforesaid District Court and as averred in the answers he was occupying public quarters in Fort San Geronimo, on the Government reservation. Thus he attempted to mislead the appellee McCarl in the audit and settlement of his accounts.

Section 35, Criminal Code of March 4, 1909, 35 Stat. 1095, as amended by the act of October 23, 1918, 40 Stat. 1015-1016, provides for a punishment by fine and imprisonment for any person who shall—

\* \* \* make or cause to be made or present or cause to be presented for payment or approval to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof,



or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent. \* \* \*

It is to be remembered that these same items of rental allowances which appellant claimed when he had promised that if given the lease, he would not do so, and for which he certified that public quarters were not available, when he was actually residing at the time in Fort San Geronimo, are the items which the appellees have treated as advances of retired pay to appellant, who contends that they should not be so treated, and that he is entitled to his current retired pay, notwithstanding these advances.

As to the second point: We submit, in the first place, that appellant has done iniquity to the Secretary of the Navy in misleading that official to the execution of the lease of July 15, 1921, which the district court ordered cancelled, and in breaking his promise in securing the lease not to claim rental allowances when ordered to active duty. We also submit that he has attempted to deceive the appellee McCarl in securing allowance in his accounts of credits for rental allowances obtained on his certificate that public quarters were not available for his occupancy when he was, in fact, at that time occupying public quarters.

The court said in *Danciger v. Stone*, 187 Fed. 853, that—

But we have already seen that relief has been refused in many cases where the de-

fendant was not concerned, either as victim or participant, in plaintiff's misconduct, but where the granting of relief would permit plaintiff, sometimes very indirectly, to gain an advantage through a wrong perpetrated against a third person or against the public. The maxim itself affects the equitable relations between the parties wherever plaintiff's misconduct is in any way involved in the subject matter of litigation. \* \* \*

We submit in the second place that while for jurisdictional purposes it may be held as in the *Cox* and *Pence cases, supra*, that a suit against appellees is not a suit against the United States, the suit in this case concerns the public money of the United States, and that the Court should brush aside technicalities of procedure, at least to the extent of permitting appellees to avail themselves of the equitable defenses of the United States. There is ample authority for so doing. *Brashear v. Mason*, 6 How. 93; *Wells v. Roper*, 246 U. S. 335; *Louisiana v. McAdoo*, 234 U. S. 627; *Margulies v. McCarl*, 10 Fed. (2d) 1012. Particularly is this true when plaintiff is appealing to the discretion of the Court.

But even in this connection there must be remembered the transactions out of which all this arises—they were with the United States as such and claims based thereon would be payable by the United States from public funds. It would be inconsistent to hold that one related to one entity and another to another entity and it is immaterial whether the iniquity related to the United States or related to

the Government officials—the basic condition remains appellant seeks the fruit of his own wrong, directly or indirectly from the United States, and is before this Court with unclean hands.

We submit in the third place, that the iniquity of appellant more nearly affects his standing in a Court of Equity to obtain further sums from the United States than did the iniquity of the two individuals in the *Pan Petroleum case*, which not only prevented said company from obtaining affirmative relief in Equity but authorized an Equity Court to give affirmative relief against said company. In other words, the two individuals in the *Pan Petroleum case* did not constitute parties to the record—one had no connection with the oil companies, and the other was a minority stockholder therein. Here the iniquity is that of appellant and even if the appellees may not be permitted to take advantage of the iniquity as a defense, this Court should, of its own motion, deny the relief sought by appellant in Equity and sustain the decree of the court below.



## II

**When the account of a retired officer of the Navy shows an excess of debits over credits, he is not entitled to payment of further sums until sufficient credits accrue to balance the debits**

The pertinent statutes applicable to retired officers of the Navy are as follows:

Section 1462, Revised Statutes: "No officer on the retired list of the Navy shall be employed on active duty except in time of war."

Act of August 22, 1912, 37 Stat. 329: "Hereafter any naval officer on the retired list may, with his consent, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore \* \* \*."

Section 1459, Revised Statutes: "Officers on the retired list shall be withdrawn from command \* \* \* and from the line of promotion on the active list."

Section 1588, Revised Statutes: "The pay of all officers of the Navy who have been retired \* \* \* on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other offi-

cers on the retired list shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.”

There is a fundamental distinction between Navy officers on the retired list and Navy officers on the active list. See *Thornley v. United States*, 113 U. S. 310; *Roget v. United States*, 148 U. S. 172. Whether the sums paid to retired officers on inactive duty be a gratuity, pension, or compensation is not defined in the law. The Court of Claims suggested in *Geddes v. United States*, 38 Ct. Cls. 428, at page 445, that, “as a matter of fact, the pay of a retired officer is not compensation” and that—

\* \* \* It is well settled that an officer on the retired list owes no service to the Government in time of peace; that if called into service in time of war he returns thereby to the active list and receives full pay; that there is but one military office which he can hold—that of Superintendent of the Soldiers’ Home; and that his reduced retired pay is but an honorary form of pension to be paid him when, having reached a certain age, it is presumed that he is no longer well fitted to render active service to the Government.

\* \* \*

and, page 446, that—

\* \* \* This court has held ever since the *Collins’s Case* (15 C. Cls. R., 22, 40) that the pay of a retired officer “is not given as com-

pensation for discharging the duties of any office during the period for which it is to be paid, but rather as a bounty and in the nature of a pension for services to his country previously performed.” \* \* \*

But see 29 Op. Atty. Gen. 503.

It is clear, however, that the “pay” which a retired officer is allowed is in no sense to be confused with the “pay” which an officer on the active list receives. *Obviously the Cox and Pence cases are not authority for the position appellant attempts to take; that is, that he is entitled to his retired pay under those decisions, notwithstanding his indebtedness to the United States which, in the state of the pleadings on the submission of the case, must be taken as admitted to be due the United States.* Also, these two cases must be considered in the light of legislation subsequent to the *Cox case* and not adverted to in the *Pence case*, namely, acts of May 26, 1926, 44 Stat. 654, and July 3, 1926, 44 Stat. 815.

Furthermore, the *ab inconvenienti dictum* of the court in the *Cox case* against the withholding of the pay of an officer on the active list does not apply to an officer on the retired list of the Navy on inactive duty. In retirement he is for all intents and purposes a civilian, who may come and go about his private affairs as he may see fit. Certainly there is no public policy involved which would require this court in an otherwise proper case to interfere



by injunction and direct the appellees to ignore the debit items in appellant's account and to pay him the credit items of accruing retired pay, particularly when appellant could institute suit against the United States in the Court of Claims and the Government could interpose and prove a counterclaim pursuant to section 145, Judicial Code of March 3, 1911, 36 Stat. 1136, 1137, for the debit items, and thus the entire matter could be adjusted if appellant desires a judicial review of his account. There is ample authority in support of this point. *Brashear v. Mason*, 6 How. 93; *Decatur v. Paulding*, 14 Pet. 497; *United States v. Guthrie*, 17 How. 94; *United States v. Lynch*, 137 U. S. 280; *Lochren v. Long*, 6 App. D. C. 486; *Hall v. Payne*, 48 App. D. C. 279; *Bailey v. George*, 259 U. S. 16; *Crozier v. Krupp*, 224 U. S. 290.

### III

For the purpose of the record, and in order that the points may not be considered as waived, we make, without argument, the following additional points:

1. That the courts of the District of Columbia are without equity jurisdiction to order money paid from funds authorized by general appropriations to be drawn from the United States Treasury for payment in accordance with the facts of an officer's service and the terms of other statutes, particularly when that officer is indebted in his accounts with the United States;

2. That the United States is a necessary and indispensable party to an equity proceeding against the appellees because of their official action concerning the public money of the United States payable from general appropriations and determined in accordance with the facts and the terms of other statutes than the appropriation act;

3. That the duty demanded of the appellees is discretionary and not ministerial; and

4. That there is a plain and adequate remedy at law in a suit against the United States in the Court of Claims which has exclusive jurisdiction under the Judicial Code of a suit concerning an officer's salary, fees, or emoluments and which, alone, should

defeat the equity jurisdiction of this court in this class of cases.

It should not be overlooked that the acts of May 26, 1926, and July 3, 1926, *supra*, in their provisions, represent practical approval of the accounting procedure.

#### CONCLUSION

For reasons herein stated, the decree of the court below dismissing the bill of complaint was correct and should be affirmed.

Respectfully submitted.

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